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Egalitarianism and the Warren Court

Philip B. Kurland
University of Chicago

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*Philip B. Kurland**

As late as 1966, an English philosopher could say that the word "equality," unlike the words "freedom," "liberty," and "justice," was not a "value word" but only a descriptive one.[1] He was not denigrating the term or the concept. He was saying that "when people talk about equality in a political or moral context what they really mean to talk about is some closely evaluative concept, such as impartiality or justice."[2] What may have been true in England in 1966 was only partially true in the United States. While the word "equality" may still be used here to invoke other notions, it has now developed charisma—to use another word that became popular at the same time. Equality is the banner behind which there have been, both literally and figuratively, many marchers. In constitutional terms, "equality" has become the first freedom.[3] It is a goal—a value—in itself that, to many, needs little or no justification.

The difficulty, of course, is that, even if it is self-justifying, the concept is not self-defining. A century ago, Sir James Fitzjames Stephen wrote that "equality is a word so wide and vague as to be by itself almost unmeaning . . . ."[4] A plethora of recent literature on the subject confirms both Stephen's dictum and the widespread interest that has developed in the subject.[5] These writings make it abundantly clear that there is vast disagreement about the word's

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* Professor of Law, University of Chicago. A.B. 1942, University of Pennsylvania; LL.B. 1944, Harvard University.—Ed.

1. J. WILSON, EQUALITY 17-18 (1966). *Id.* at 18:

> "[E]quality" is primarily at least, a descriptive and not an evaluative term. It may be more reasonable to suppose that equality is the corner-stone of a building whose more obvious features are made up of other political concepts; that the notion of equality, just because it is descriptive, is the essential point of departture of the road to liberalism.

2. *Id.* at 19.

3. *See* Kurland, *"Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government"*, 78 HARV. L. REV. 143 (1964).

4. LIBERTY, EQUALITY, AND FRATERNITY 201 (1873).

5. *See, e.g.*, A. GRIMES, EQUALITY IN AMERICA (1964); R. HARRIS, THE QUEST FOR EQUALITY (1960); S. LAKOFF, EQUALITY IN POLITICAL PHILOSOPHY (1964); NOMOS IX: EQUALITY (J. Pennock & J. Chapman ed. 1967); J. TENBROEK, EQUAL UNDER LAW (enlarged ed. 1965); J. WILSON, *supra* note 1.

connotations. If it is "value free," it nevertheless engenders much excitement among both its proponents and its opponents. Indeed, the time has come when to speak out against "equality" is to invite the same reaction as once was evoked by condemning Prohibition.

For my purposes, I prefer to accept the suggestion made by Chief Judge Cardozo almost fifty years ago, when a different demand for equality was filling the air—a demand for equality of bargaining power to combat the constitutional concept of freedom of contract. He said then: "The same fluid and dynamic conception which underlies the modern notion of liberty, as secured to the individual by constitutional immunity, must also underlie the cognate notion of equality."[6] Like the due process clause, the equal protection clause, which must bear most of the burden for translating the various notions of equality into constitutional sanctions, must be recognized as "fluid and dynamic." Certainly such a reading leads to a broad judicial authority. At the same time, it might be noted that the background for Cardozo's statement was provided by *Coppage v. Kansas*,[7] a knowledge of which might give rise to some arguments for judicial restraint.

There are those, including some who have served on the Warren Court, who have found justification for the contemporary egalitarianism in the origins of the Constitution. For the most part, this attitude has been based on what Professor Alfred Kelly has appropriately termed "law office" history.[8] It was just such history, history that asks too much justification from the past, that Justice Goldberg was relying on both in his 1964 Madison lecture[9] and in his 1964 opinion in *Bell v. Maryland*,[10] which read very much alike. He asserted "that equality and liberty were the 'twin themes' of the American Revolution."[11] Liberty and equality may well have been themes struck by some of the revolutionaries, but certainly not liberty or equality as their advocates presently conceive them. Justice Gold-

6. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 81-82 (1921).

7. 236 U.S. 1 (1915) (state statute forbidding an agent of any employer from coercing, requiring, demanding, or influencing any person to enter an agreement not to join a labor organization held to violate the due process clause of the fourteenth amendment).

8. *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122.

9. *Equality and Governmental Action*, 39 N.Y.U. L. REV. 205 (1964). The April dateline on the issue of the review in which Justice Goldberg's lecture appeared is reminiscent of the T. S. Eliot's lines: "April is the cruellest month . . . mixing Memory and desire." *The Waste Land*, in COMPLETE POEMS AND PLAYS 37 (1958).

10. 378 U.S. 226, 286 (1964). The lecture was delivered on February 11, 1964; the opinion came down on June 22, 1964.

11. Goldberg, *supra* note 9, at 205.

berg did concede that equality was not mentioned in the Constitution. But this was due, he stated, to the fact that the founders "naturally assumed [that equality] was encompassed within the concept of liberty whose blessings they heralded in the preamble to the Constitution and later specifically guaranteed in the due process clause of the fifth amendment."[12] The character of his argument was best revealed when he invoked Magna Carta as providing one of the traditions of equality on which the American Revolution rested. Magna Carta may have become a noble myth,[13] but the notion that King John and the barons were concerned about their equality with the people would be difficult to justify.[14]

Of course, there is evidence that some kinds of equality were sought to be achieved at Philadelphia in 1787, and, as Goldberg noted, some are in fact stated in the Constitution. He found solace, for example, in the privileges and immunities clause of article IV, which equated citizens of one state with citizens of the other states. But as to who were citizens, the Constitution was silent. Even the privileges and immunities provided, to the extent they were defined, seem trivial when compared with the egalitarian aspirations of today.[15] Goldberg also referred to article IV's guarantee of a republican form of government. But he did not talk about the limited franchise then available in most jurisdictions, the structure of the upper houses of the state legislatures, or of the elitist character of the United States Senate.

One can find forms of equality everywhere, if those are what he is looking for. At the Convention itself, Benjamin Franklin suggested that the pressure for a monarchy was based on the desire for equality. He said that "there is a natural inclination in mankind to Kingly Government. It sometimes relieves them of Aristocratic domination. They had rather have one tyrant than five hundred. It gives more of the appearance of equality among Citizens, and that they like."[16] Indeed, the distinction between equality and the appearance of equality is an important one, as we have come to learn.

The Constitution did abolish titles of nobility, and its provision in article I, section 9, for the apportionment of direct taxes

12. *Id.* at 207.

13. *See* S. THORNE, A. DUNHAM, P. KURLAND & I. JENNINGS, THE GREAT CHARTER 48-74 (1965).

14. The arguments about, and the ambiguities of, Magna Carta have been canvassed in J. HOLT, MAGNA CARTA (1965).

15. *See* Corfield v. Coryell, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

16. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83 (rev. ed. M. Farrand 1937) [hereinafter Farrand].

was also egalitarian in its direction. So, too, were the abolition of bills of attainder and the ban on a religious test for office. Even the necessary and proper clause and the supremacy clause might be construed as egalitarian, insofar as they contribute to a national uniformity of applicable rules of law.

The sticking point always comes with the recognition that the Constitution also dealt with slavery. Justice Goldberg disposed of that problem in this way:

> In sum, then, the Constitution of the new nation, while heralding liberty, in effect declared all men to be free and equal—except black men, who were to be neither free nor equal. This inconsistency reflected a fundamental departure from the American creed, a departure which it took a civil war to set right.[17]

Which was the creed and which the aberration appears to have been easier for Justice Goldberg to be sure of than it is for many historians, professional as well as amateur. Nor did the Civil War "set [it] right."

At the time of the Revolution, however much one man was the equal of the other, it was not thought to be the role of government to effect that equality. It was expected only that the government would treat one man as it would another. But that meaning of equality is a far cry from the one that the Warren Court confronted. A description of the Revolutionary scene more fitted to the facts and less to the wish may be found in Professor John Roche's remarks:

> If one were to have the temerity to translate this portion of The Declaration [of Independence] into operational political theory, a different proposition would emerge—the proposition which, I submit, is basic to an understanding of the development of equality in America over the past three centuries. It would run roughly as follows—*all those who have been admitted to membership by the political community are equal.* In other words, men achieve equality as a function of membership in the body politic—and this membership is not an inherent right, but a privilege which the majority accords on its own terms.
>
> The myth of the libertarian past dies hard, but if we are going to grasp historical reality, we must once and for all lay to rest the notion that our forefathers built a pluralistic society around the principles of liberty and equality.[18]

The phrase in the Declaration of Independence to which Pro-

17. Goldberg, *supra* note 9, at 208.

18. *Equality in America: The Expansion of a Concept*, 43 N.C. L. Rev. 249, 251-52 (1965).

fessor Roche referred—that "all men are created equal"—has been the keystone on which the myth has been built by the Justices of the Warren Court, both on and off the bench.[19] But the phrase took hold, so far as I know, only once in the early history of this country: in the 1783 Massachusetts case of *Quock Walker v. Nathaniel Jennings*,[20] the opinion in which did not see the light of day until 1874. Furthermore, the Declaration's assertion of the equal rights of all men referred only to their rights "to life, liberty, and the pursuit of happiness," and it is doubtful that it encompassed any more. In any event, this happy phrase—"all men are created equal"—saw no consequence in the Constitution.[21]

It is far easier to accept the proposition that the founders contemplated an open society than it is to argue that they anticipated a classless one. Pinckney certainly spoke for an open society at the Convention when he said:

> The people of the U. States are perhaps the most singular of any we are acquainted with. Among them there are fewer distinctions of fortune & less of rank, than among the inhabitants of any other nation. Every freeman has a right to the same protection & security; and a very moderate share of property entitles them to the possession of all the honors and privileges the public can bestow: hence arises a greater equality, than is to be found among the people of any other country, and an equality which is more likely to continue—I say this equality is likely to continue, because in a new Country, possessing immense tracts of uncultivated lands, where every temptation is offered to emigration & where industry must be rewarded with competency, there will be few poor, and few dependent—Every member of the Society almost, will enjoy an equal power of arriving at the supreme offices & consequently of directing the strength & sentiments of the whole Community. None will be excluded by birth, & few by fortune, from voting for proper persons to fill the offices of Government—the whole community will enjoy in the fullest sense that kind of political liberty which consists in the power the members of the State reserve to themselves, of arriving at the public offices, or at least, of having votes in the nomination of those who fill them.[22]

This was the attitude of one whom Professor Morgenthau has labeled an outstanding egalitarian of his time.[23] There is some evidence, however, of a similar attitude in the expressed views of Alex-

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19. *See* notes 9-10 *supra*.

20. *See* DOCUMENTS OF AMERICAN HISTORY 110 (8th ed. H. Commager 1968).

21. *See* C. BECKER, THE DECLARATION OF INDEPENDENCE 234 (reprint ed. 1942).

22. 1 Farrand, *supra* note 16, at 398.

23. *See* H. MORGENTHAU, THE PURPOSE OF AMERICAN POLITICS 11-18 (1960).

ander Hamilton, who hardly can be characterized in the same way. For example, as Professor Rossiter has pointed out:

> Article II, section 1 of [Hamilton's] draft constitution placed the vote for members of the House in "the free male citizens and inhabitants of the several States comprehended in the Union, all of whom, of the age of twenty-one years and upwards shall be entitled to an equal vote." Other articles set a modest property qualification for voters in senatorial and presidential elections, and this may be an accurate measure of how far Hamilton was prepared to go in making popular government truly popular. While he welcomed some political democracy in his ideal polity, he certainly did not want it to take command.[24]

If the Warren Court's egalitarian bent cannot find specific justification in the language or history of the Constitution as originally framed, it is equally bereft of assistance from the history and purpose of the equal protection clause of the fourteenth amendment, the place at which the doctrine of equality specifically entered constitutional language. Again, however, the Warren Court preferred to indulge its liking for rewriting history. In *Brown v. Board of Education*,[25] the unanimous Court took solace in the ambiguity of the amendment's history. Since that time, however, a divided Court has purported to resolve contemporary problems by finding words here and there in congressional debates and reports or in polemical writings of that time and this.[26]

There are few things in the history of the equal protection clause that are clear. One is that it was aimed at the destruction of the Black Codes of the South. A second is that it, along with other provisions of the fourteenth amendment, was intended to protect the terms of the 1866 Civil Rights Act against judicial invalidation and legislative repeal. How far beyond legislative and administrative discrimination which is openly based on race the amendment was intended to go cannot be told from the language or spirit of

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24. C. ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 158-59 (1964). Pinckney had also proposed a property requirement for office holders—not less than $50,000 for legislators and judges and not less than $100,000 for the executive. 2 Farrand, *supra* note 16, at 248. This proposal may have been foresighted, but it was hardly egalitarian.

25. 347 U.S. 483, 489 (1954). *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

26. *See, e.g.*, Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUP. CT. REV. 101; Paulsen, *The Sit-In Cases of 1964: "But Answer Came There None"*, 1964 SUP. CT. REV. 137; Van Alstyne, *The Fourteenth Amendment, the "Right" To Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33; Kelly, *supra* note 8, at 142-49; Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39. The relevant cases and the vast literature on the subject may be garnered from the footnotes in these articles.

the times. Nor is the intended scope of the 1866 Act clear from the legislative history either of the Act or of the amendment.[27] But, as Dean Francis Allen has stated in his summary of the role of the fourteenth amendment,

> the great moral imperatives of due process and equal protection could not be confined to their historical understandings when applied to the emerging issues of modern American life. There is evidence that those who drafted Section 1 intended that the meanings of these phrases should evolve and expand with the passage of time and changes of circumstance.[28]

If the legislative history and the language of the fourteenth amendment's equal protection clause afforded scant support to the Warren Court's resolution of the specific problems that came before it, little more solace could have been gained from that kind of history in which the Court is supposed to be expert—earlier decisions construing the clause. The prime limitation on the application of the clause—that it barred only state action—was established early[29] and had not yet been rejected by the time of Warren's accession to the bench, although it may have been seriously undermined by *Shelley v. Kraemer*.[30] On the other hand, the equal protection clause itself had been expanded in a direction uncalled for by either its history or its language. In the *Slaughter-House Cases*,[31] with a prescience that the *New Yorker* usually takes note of under the rubric "The Clouded Crystal Ball," the Court expressed doubt that "any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[32] It would have been better had this focus been maintained. As it turned out, for most of the amendment's history, Negroes were only incidentally afforded the benefits of the clause. In part, this anomaly occurred because the judicial process is not self-starting. Except in criminal cases, it takes an interested person with adequate resources

27. *See* Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89.

28. *The Constitution: The Civil War Amendments: XIII-XV*, in 1 D. BOORSTIN, AN AMERICAN PRIMER 165 (1966).

29. *See, e.g.*, Virginia v. Rives, 100 U.S. 313, 318 (1880); *Ex parte* Virginia, 100 U.S. 339 (1880); Civil Rights Cases, 109 U.S. 3 (1883). For the strongest argument advanced on behalf of the abolition of the restriction, at least in race relations cases, see Black, *"State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

30. 334 U.S. 1, 22 (1948).

31. 83 U.S. (16 Wall.) 36 (1873).

32. 83 U.S. (16 Wall.) at 81.

to initiate and carry on judicial proceedings to protect his rights. Unlike the Chinese in California,[33] Negroes as a class could not secure their rights judicially before they had the resources to support litigation or legislation, and they could not get the resources before they had secured their rights. But the early cases hardly indicate a certainty of much success even if they had had the opportunity to utilize the courts freely.

The nadir of protection for Negroes came in 1883, with the invalidation of congressional legislation in the *Civil Rights Cases*.[34] Thereafter, although moving with all the deliberate speed of a glacier, the Court proceeded in the right direction. From the beginning, the Court, with the support of Congress, was prepared to confer on Negroes the dubious privilege of serving on juries.[35] Zoning laws providing for segregation of neighborhoods were invalidated in 1917.[36] And racially restrictive covenants became unenforceable in 1948, thanks to *Shelley v. Kraemer*.[37]

On the other hand, the Court borrowed from Massachusetts[38] the "separate but equal" doctrine and applied it both to transportation facilities[39] and to education[40] whence it had come. But the doctrine had been—if I may use the word—disintegrating in both of these areas long before the era of the Warren Court.[41] Still, the use of the equal protection clause to protect the political rights of Negroes was essentially abortive,[42] until the cases dealing with all-

33. The very large number of cases in which the Chinese attempted to use the courts—often successfully—for the protection of their legal and constitutional rights is detailed at length in H.N. Janish, The Chinese, the Courts, and the Constitution (1969) (dissertation submitted in partial fulfillment of the requirements for the J.S.D. degree, on file in the library of The Law School, University of Chicago).

34. 109 U.S. 3 (1883).

35. *See, e.g.*, Virginia v. Rives, 100 U.S. 313 (1880); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Patton v. Mississippi, 332 U.S. 463 (1947); Cassell v. Texas, 339 U.S. 282 (1950); Avery v. Georgia, 345 U.S. 559 (1953).

36. Buchanan v. Warley, 245 U.S. 60.

37. 334 U.S. 1 (unenforceable in state courts); Hurd v. Hodge, 334 U.S. 24 (1948) (unenforceable in the District of Columbia). *See also* Barrows v. Jackson, 346 U.S. 249 (1953).

38. Roberts v. City of Boston, 59 Mass. 198, 209 (1849). *See also* People *ex rel.* King v. Gallagher, 93 N.Y. 438 (1883).

39. Plessy v. Ferguson, 163 U.S. 537 (1896).

40. Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899); Gong Lum v. Rice, 275 U.S. 78 (1927).

41. *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); *cf.* Morgan v. Virginia, 328 U.S. 373 (1946); Henderson v. United States, 339 U.S. 816 (1950).

42. Pope v. Williams, 193 U.S. 621 (1904); Giles v. Harris, 189 U.S. 475 (1903); Williams v. Mississippi, 170 U.S. 213 (1898). *But see* Guinn v. United States, 238 U.S. 347 (1915) (grandfather clause invalidated).

white primaries came before the Court.[43] In sum, prior to 1954, the equal protection clause had not been effectively used by the Court for the protection of Negro rights, although by that year the climate had changed and a recognition of this function was beginning to be acknowledged.

Other minorities did not fare much better under the equal protection clause even though the Chinese had successfully evoked the classic decision of *Yick Wo v. Hopkins*:[44]

> Though the law itself be fair on its face and impartial in its appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is . . . within the prohibition of the Constitution.[45]

This case left the Court with a powerful doctrine for the restraint of state power, but it did not say on whose behalf that doctrine would be used. As it turned out, the doctrine was not used to protect other racial minorities, as is evidenced by the Japanese exclusion cases;[46] nor was it used to protect women[47] or aliens.[48] But, at least as to the Japanese-Americans and the aliens, the trend in the other direction had started before 1954.[49]

To the extent that it performed any function, the equal protection clause was a supplementary device for protecting business activities against state exercises of police[50] and taxing[51] powers. With the ipse dixit that corporations are "persons" protected by the equal

43. Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); *cf.* United States v. Classic, 313 U.S. 299 (1941); Smith v. Allwright, 321 U.S. 649 (1944).

44. 118 U.S. 356 (1886).

45. 118 U.S. at 373-74.

46. Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944). *See* E. ROSTOW, *The Japanese American Cases—A Disaster*, in THE SOVEREIGN PREROGATIVE 193 (1962). The argument that the equal protection clause is not applicable to the national government is effectively answered by Hurd v. Hodge, 334 U.S. 24 (1948), and by Bolling v. Sharpe, 347 U.S. 497 (1954).

47. *See, e.g.*, Goessaert v. Cleary, 335 U.S. 464 (1948).

48. *See* Ohio *ex rel.* Clarke v. Deckenbach, 274 U.S. 392 (1927); Terrace v. Thompson, 263 U.S. 197 (1923); Crane v. New York, 239 U.S. 195 (1915); Heim v. McCall, 239 U.S. 175 (1915); Patsone v. Pennsylvania, 232 U.S. 138 (1914).

49. *See Ex parte* Endo, 323 U.S. 283 (1944); Takahashi v. Fish & Game Commn., 334 U.S. 410 (1948); Oyama v. California, 332 U.S. 633 (1948).

50. *See, e.g.*, Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459 (1937); Mayflower Farms v. Ten Eyck, 297 U.S. 266 (1936); Smith v. Cahoon, 283 U.S. 553 (1931).

51. *See, e.g.*, Valentine v. Great Atl. & Pac. Tea Co., 299 U.S. 32 (1936); Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935); Concordia Fire Ins. Co. v. Illinois, 292 U.S. 535 (1934); Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933); Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928); Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Southern Ry. v. Greene, 216 U.S. 400 (1910).

protection clause,[52] Chief Justice White made them the primary beneficiaries of that provision. But essentially, the clause was only a tail to the due process kite, as was implicit in Justice Holmes' remark in *Buck v. Bell* that the equal protection clause was the "usual last resort of constitutional arguments."[53] With the decline of substantive due process in the economic realm[54] went the fall of the equal protection clause in the same area. It is clear, then, that prior to the Warren Court, the equal protection clause was not a strong element in the Supreme Court's arsenal. The egalitarian movement was not yet a part of the American *Zeitgeist.* But equality was beginning to cast its shadow. Its entrance on the scene at center stage was heralded by *Brown v. Board of Education.*[55]

It was appropriate that the resurrection of the equal protection clause should be the result of the Negro Revolution of the 1950's and 1960's. Indeed, in a way, Chief Justice Warren was wrong when he suggested in *Brown* that the Court could not turn back the clock. For the Court was doing exactly that. It was returning to a recognition of the central purpose of the equal protection clause—to protect Negroes from discrimination at the hands of legislative, administrative, and judicial bodies controlled by white majorities. It was a return to the understanding of the *Slaughter-House Cases* as to the use for which the clause was framed. What could not be done was to treat the problems as the Court might have treated them earlier, under different circumstances, in an essentially different society.

Certainly the central problem of equality in this country has always concerned the Negro's right of access to American society. This fact was recognized early by Tocqueville[56] and too late by Myrdal.[57] By 1954, the resolution of the American dilemma had been postponed until it could be postponed no longer. If other governmental bodies did not see this necessity, at least the Supreme Court's eyes were open.

In 1835, Tocqueville anticipated the problem with which the

52. Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1866). *But see* Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85 (1938) (Justice Black, dissenting); Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576-80 (1949) (Justice Douglas, dissenting).

53. 274 U.S. 200, 208 (1927).

54. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial,* 1962 SUP. CT. REV. 34.

55. 347 U.S. 483 (1954).

56. *See* text accompanying note 59 *infra.*

57. 1 G. MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY xli-lv (1944).

country is now faced: "If ever America undergoes great revolutions, they will be brought about by the presence of the black race on the soil of the United States: that is to say, they will owe their origins, not to the equality but to the inequality of condition."[58] Earlier in his epochal work he had written:

> As long as the Negro remains a slave, he may be kept in a condition not far removed from that of the brutes; but with his liberty he cannot but acquire a degree of instruction that will enable him to appreciate his misfortunes and to discern a remedy for them. Moreover, there exists a singular principle of relative justice which is firmly implanted in the human heart. Men are much more forcibly struck by those inequalities which exist within the same class than by those which may be noted between different classes. One can understand slavery, but how allow several millions of citizens to exist under a load of eternal infamy and hereditary wretchedness? . . .
>
> As soon as it is admitted that the whites and the emancipated blacks are placed upon the same territory in the situation of two foreign communities, it will be readily understood that there are but two chances for the future: the Negroes and the whites must either wholly part or wholly mingle. . . . I do not believe that the white and black races will ever live in any country upon an equal footing. But I believe the difficulty will be still greater in the United States than elsewhere.[59]

It is not hard to understand why the problem was not faced before 1954. What is more difficult to comprehend is why it had to be faced in that year. The answer is probably contained in Tocqueville's statement. Despite the emancipation, it was not until the migration to the cities that the Negroes came face to face with the awful realities of discrimination, for the migration brought them close to, but not into, the community that the fourteenth amendment intended that they share. Why then was the central question posed in terms of public education? Essentially the answer is that that area is one of the last realms of state competence and is one, as the Supreme Court told us in the last term of the Warren Court, which is basic to many of the other disqualifications that are imposed on Negroes.[60]

This Article deals with the Warren Court's desegregation cases in some detail, for they form the basis of its contributions to con-

58. 2 A. TOCQUEVILLE, DEMOCRACY IN AMERICA 256 (P. Bradley ed. 1945).

59. 1 *id.* at 373. Tocqueville's doleful prediction was shared, as he remarked, by Thomas Jefferson. *Id.* at 373 n.46.

60. *See* Gaston County v. United States, 395 U.S. 285 (1969) (literacy test for voting held invalid because of prior educational deprivation). *See also* Gould, *Racial Equality in Jobs and Unions, Collective Bargaining, and the Burger Court*, 68 MICH. L. REV. 237, 254-57 (1969).

temporary egalitarianism. At the core of this new constitutional jurisprudence are the school desegregation cases; then come cases that do not involve education; and the third layer is provided by the cases concerned with national legislation dealing with this intractable problem. All of these cases demonstrate that rapid movement toward equality of the races is not attainable through the judicial process. The Court has moved faster than society is prepared to go. This is not to denigrate the Court's efforts. The goal is certainly closer than it would have been, and the situation is less explosive than it might have been, without the Court's efforts. We are, after all, dealing with problems of a social revolution, and such problems are not the usual grist for the judicial mill.

Brown v. Board of Education opened a Pandora's box that was about to release its contents without judicial prying. What the ensuing years were to reveal was essentially that the Court, by itself, is incapable of effecting fundamental changes in society. Of course, it can spark explosions. But the special problems of school integration have remained largely unchanged, with small exceptions like Berkeley, California, and Washington, D.C.;[61] and they have done so even though the other branches of the national government have joined the attempt to bring about change. When counsel for the State of South Carolina suggested to the Supreme Court that it would take sixty to ninety years to bring public opinion around to acquiescence in school desegregation,[62] his statement sounded like forensic hyperbole. Today it has all the appearance of stark reality.

The immediate result of the *Brown* decree was to shift the battlefield from the heights of the Supreme Court to the foxholes of the federal district courts.[63] In 1958, the issue was back in the Supreme Court under highly explosive conditions. *Cooper v. Aaron*[64] arose out of a conflict between good and evil in the city of Little Rock, Arkansas. After the *Brown* decision, Little Rock's school board prepared a plan for the gradual integration of its school system, although Arkansas had not been a party to the *Brown* litiga-

61. *See* J. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY 1 (1966); U.S. COMMN. ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION, 1966-67, at 90-91 (1967).

62. ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952-55, at 412, 419-21 (L. Friedman ed. 1969). This suggestion was made during the 1955 reargument of *Briggs v. Elliott*, which was decided with *Brown*, when the Court was considering the appropriate remedy to grant in these cases.

63. *See* J. PELTASON, FIFTY-EIGHT LONELY MEN (1961).

64. 358 U.S. 1 (1958).

tion and was not subject to the *Brown* decree. The plan called for the integration of the upper grades at the outset and annual additions of immediately lower grades until the entire program was covered. Some Negro citizens of Little Rock complained in a suit in the district court that the plan was too gradual, and they sought a decree ordering an increased pace. The trial court declined this relief and approved the plan,[65] and its decision was affirmed by the United States Court of Appeals.[66] At the state level, however, a razorback governor, with the unlikely name of Orville Faubus, led an insurrection against the Supreme Court's decision in *Brown*. In 1956, the Arkansas constitution was amended to call for resistance to *Brown*, and legislation was enacted by which it was hoped to prevent desegregation. Nevertheless, the city of Little Rock, cognizant of the meaning of the Constitution's supremacy clause, proceeded with its plan.

The day before the first Negroes were to enter a previously white high school in Little Rock, Faubus sent national-guard troops to prevent their entrance. What had been peaceful became chaotic. The district court ordered the integration to proceed; the national guard prevented it. The court then entered an injunction against any interference by Faubus and his troops. Accordingly, the national guard was withdrawn, but it was too late. The mob had been aroused. Only the arrival of federal troops permitted the Negro students to enter the high school. Little Rock had become an armed camp; law and order had disappeared. On petition of the school board, the district court granted permission to postpone the effectuation of the plan for two and one-half years.[67] The court of appeals, however, reversed the trial court's judgment,[68] and the Supreme Court affirmed the judgment of the court of appeals.[69] The Supreme Court recognized the problems of federalism that were involved in *Brown*, but it was steadfast in its adherence to its earlier position.[70] Its opinion was issued with the name of every Justice listed among its authors:

> The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and the Legislature. As this Court said

65. Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1956).
66. 243 F.2d 361 (8th Cir. 1957).
67. Aaron v. Cooper, 163 F. Supp. 13 (E.D. Ark. 1958).
68. 257 F.2d 33 (8th Cir. 1958).
69. 358 U.S. 1 (1958).
70. 358 U.S. at 19-20.

some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Buchanan* v. *Warley*, 245 U.S. 60, 81. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties, as counsel for the Board forthrightly conceded on oral argument in this Court, can also be brought under control by state action.

. . . .

Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury* v. *Madison*, 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "anything in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support this Constitution." Chief Justice Taney speaking for a unanimous Court in 1859, said that this requirement reflected the framers' "anxiety to preserve [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority on the part of a State . . . ." *Ableman* v. *Booth*, 21 How. 506, 524.

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery . . . ." *United States* v. *Peters*, 5 Cranch 115, 136. A Governor who asserts a power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, "it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal

> Constitution upon the exercise of state power would be but impotent phrases . . . ." *Sterling v. Constantin*, 287 U.S. 378, 397-398.[71]

The Court in this case was being carried away with its own sense of righteousness if, by the preceding paragraphs, it meant that a decision of the Supreme Court is supreme law in the same way that a legislative act of Congress is supreme law. The judgment in *Brown* was not binding on the state of Arkansas which was not a party to it. It was, however, binding precedent on any court before which the same question should arise. Such a court, whether it be federal or state, would be bound to choose the declaration of principle by the Supreme Court rather than the announced law of the state. Here Arkansas was a party to the litigation in the United States district court in Little Rock; and while it had the right to appeal the case in order to secure a reversal of position by the Supreme Court, it had no right to flout the order of the lower federal court. Thus, the "supreme law of the land" was not the *Brown* decision, but the order of the trial court issued in the course of that court's duty to follow *Brown*. This, and this alone, is the meaning of *Peters*, of *Ableman*, and of *Sterling*—the cases the Court quoted and relied upon.[72]

The state of Louisiana took a different route than Arkansas, although its goal was the same. Louisiana actually sought to invoke the ante bellum doctrine of interposition to avoid the Supreme Court's school desegregation efforts. The state legislature passed three statutes. The first provided for segregation of all public schools and the withholding of funds from any integrated school. The second authorized the governor to close all public schools if any one of them was integrated. The third provided for the takeover by the governor of any school board which was under a desegregation order. In a suit to enjoin the enforcement of these statutes, a three-judge district court held them invalid.[73] Pending disposition of the case in the Supreme Court, the state sought a stay of the injunction. In denying the stay, the Court rendered a per curiam opinion giving short shrift to the ancient arguments.[74] It exorcised quickly, if not finally, the ghosts of the Hartford Convention and the Ken-

71. 358 U.S. at 16-19.

72. *See* text accompanying note 71 *supra*.

73. Bush v. Orleans Parish School Bd., 188 F. Supp. 916 (E.D. La. 1960).

74. Bush v. Orleans Parish School Bd., 364 U.S. 500 (1960).

tucky and Virginia Resolutions. Later the Supreme Court affirmed the district court's decision without opinion.[75]

So far as the hard-core opposition to desegregation was concerned, however, the repeated decisions of the Supreme Court were of little avail. What Arkansas and Louisiana had failed to accomplish in the courts, Virginia tried to achieve. In *Griffin v. County School Board of Prince Edward County*,[76] a case involving one of the school districts involved in the original *Brown* decision, the Court was called on to review the closing of the public schools in Prince Edward County, Virginia.[77] In addition to closing the schools, the county provided financial assistance to students attending private segregated schools. The Court held it unconstitutional for one county to close its public schools while all the other public schools in the state remained open. The Court was unanimous in rejecting the tactic as unconstitutional, but it was divided as to the appropriate remedy. In an opinion by Justice Black, the Court said:

> the record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school. Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.[78]

Justices Clark and Harlan disagreed "with the holding that the federal courts are empowered to order the reopening of the public schools in Prince Edward County."[79] They apparently believed that the state retained the option under the equal protection clause either to open the Prince Edward County schools or to close all the rest, in order to assure equality of treatment.

The Court in *Griffin* also indicated that its patience was at an end: "The time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to

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75. Orleans Parish School Bd. v. Bush, 365 U.S. 569 (1961).

76. 377 U.S. 218 (1964).

77. *See also* Louisiana Financial Assistance Commn. v. Poindexter, 389 U.S. 571 (1968); St. Helena Parish School Bd. v. Hall, 368 U.S. 515 (1962).

78. 377 U.S. at 231.

79. 377 U.S. at 234.

that afforded by the public schools in other parts of Virginia."[80] This attitude was confirmed when the Court refused to stay the Fifth Circuit's order to all the southern states within its domain to desegregate by the autumn of 1967.[81] In the autumn of 1969, at the end of Warren's tenure, the order was still uneffected, but the Government was hopeful.[82]

The last of the Warren Court's major school desegregation cases were decided in 1968.[83] At issue were the so-called "freedom of choice" and "freedom of transfer" programs, which allowed parents to choose the school they wanted their children to attend or permitted them to transfer the children if the children were assigned to a school not of their choice. These programs were the last of the devious resorts of state legislatures to avoid desegregation. They certainly had not worked to accomplish desegregation.[84] In dealing with them, the Supreme Court equivocated. Justice Brennan, in *Green v. County School Board*,[85] wrote the opinion for a Court that was again unanimous. He suggested that the measure of the validity of a "free choice" system was the extent to which it eliminated a "dual system" of schools within the jurisdiction:

> It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects

80. 377 U.S. at 234.

81. Caddo Parish School Bd. v. United States, 386 U.S. 1001 (1967).

82. On August 25, 1969, *The New York Times* trumpeted: "U.S. OFFICIALS SEE PUPIL INTEGRATION DOUBLING IN THE SOUTH." At 1, col. 1. On August 26, 1969, in a less ebullient tone, the front page of *The New York Times* reported a break between the federal government and the NAACP Legal Defense Fund "because of the Nixon Administration's decision last week to throw its weight behind a slowdown in desegregation in Mississippi and, by implication, throughout the South." At 1, col. 7. *But see* note 83 *infra*.

83. Green v. County School Bd., 391 U.S. 430 (1968); Raney v. Board of Educ., 391 U.S. 443 (1968); Monroe v. Board of Commrs., 391 U.S. 450 (1968). However, in October 1969, the Court, under the leadership of Warren Burger, handed down what West's *Supreme Court Reporter* emblazoned "The Immediate Desegregation Case," banning immediately dual school systems in Mississippi. Alexander v. Holmes County Bd. of Educ., 90 Sup. Ct. 29 (1969). Although the Nixon administration vowed to implement the Court's decision, the practical effect of the case was not salutary. *See* N.Y. Times, Jan. 6, 1970, at 1, col. 2.

84. *See* U.S. COMMN. ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-67, at 45-69 (1967).

85. 391 U.S. 430 (1968).

> for dismantling the state-imposed dual system "at the earliest practical date," then the plan may be said to provide effective relief. . . .
>
> We do not hold that "freedom of choice" can have no place in such a plan. We do not hold that a "freedom-of-choice" plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that in desegregating a dual system a plan utilizing "freedom of choice" is not an end in itself.[86]

Brennan went on to show in detail how the particular plan that was the subject of review in the *Green* case failed to meet the Court's standards:

> The New Kent School Board's "freedom-of-choice" plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. . . . The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools.[87]

The Court then held, in *Raney v. Board of Education*[88] and *Monroe v. Board of Commissioners*,[89] that the respective "freedom of choice" and "freedom of transfer" plans under attack did not effectively change the "dual" systems into unitary systems and that those plans were therefore invalid. Moreover, it ordered the district courts to retain jurisdiction to ensure that desegregation took place immediately.[90]

The Court's commitment to "disestablishmentarianism" has been, from the beginning, confined to the problems arising in states in which school segregation was compelled by law before the *Brown* decisions. It has said nothing about the so-called de facto segregation in nonsouthern communities. Yet this problem is under vigorous attack by way of legislation,[91] and sooner or later the Court will have to pass on questions arising under that legislation and under its administration by the Department of Health, Education,

86. 391 U.S. at 439-40.

87. 391 U.S. at 441-42.

88. 391 U.S. 443 (1968).

89. 391 U.S. 450 (1968).

90. Green v. County School Bd., 391 U.S. at 339; Raney v. Board of Educ., 391 U.S. at 449; *see* Monroe v. Board of Commrs., 391 U.S. at 460.

91. Civil Rights Act of 1964 tit. VI, 42 U.S.C. § 2000d (1964).

and Welfare.[92] Meanwhile, the Court seemed inclined to leave the burden of implementing desegregation to the legislative and executive branches of the national government.[93]

Although the Court has long been engaged in the transfer of power from the states to the national government, the school desegregation cases marked the first time that it used the equal protection clause so fundamentally. Never before had the knife gone so deeply into the fabric of society as it did in those cases. Surgical excision of a cancer is a tricky thing. It is not clear that the prognosis is favorable.

Equality as a judicial mandate is certainly not readily accomplished. Indeed, the Court's own efforts have brought about little change. Prior to congressional action by the passage of the 1964 Civil Rights Act,[94] desegregation had been minimal. Since the Civil Rights Act, the change has been better but still not good. Clearly, the legislature with its power over the purse, has more effective instruments in its hands than does the Court for bringing about the change. On the other hand, Congress is far less committed to the metamorphosis than the Court has been. Whether any action at the national or state levels would have been forthcoming had not the Court taken the first step, no one will ever be able to say. Certainly Congress was not ready to act when the Court acted. The question also remains for some whether the desegregation rule was a better first step than an attempt at enforcement of the separate-but-equal doctrine would have been. Most "right thinking" people believe that it was. But there are reasonable men, blacks as well as whites, who believe that the conditions of the Negro in America would have improved faster if concentration had been placed on the improvement of Negro education in the black schools, that such improved education would have soon resulted in integration not only in the schools but throughout American life. On the other hand, the advice that Learned Hand gave to the President of Harvard University in 1922 still sounds persuasive even in a different context:

> . . . I cannot agree that a limitation based upon race will in the end

92. *See, e.g.*, Office for Civil Rights, U.S. Dept. of Health, Education & Welfare, *Policies on Elementary and Secondary School Compliance with Title VI of the Civil Rights Act of 1964*, 33 Fed. Reg. 4955 (1968).

93. *See, e.g.*, Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). *But see* note 83 *supra*.

94. Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 241, codified in 5 U.S.C. §§ 2204-05 (1964), 28 U.S.C. § 1447(d) (1964), 42 U.S.C. §§ 1971, 1975a-d, 2000a to h-6 (1964).

> work out any good purpose. If the Jew does not mix well with the Christian, it is no answer to segregate him. Most of those qualities which the Christian dislikes in him are, I believe, the direct result of that very policy in the past. Both Christian and Jew are here; they must in some way learn to live on tolerable terms, and disabilities have never proved tolerable. It seems hardly necessary to argue that they intensify on both sides the very feelings which they are designed to relieve on one. If after acquaintance, the two races are irretrievably alien, which I believe unproven, we are, it is true, in a bad case, but even so not as bad as if we separate them on race lines. Along that path lie only bitterness and distraction.[95]

The problems of segregation obviously extended far beyond the public schools. Although the rationale of the *Brown* case was limited to the field of education, the Court was soon faced with a series of problems not resoluble in terms of the arguments made in *Brown*.[96] In most of these cases, including all of the early ones, the Court took the easy way out. It struck down state-imposed segregation by means of per curiam orders which failed to explain how the carefully contained *Brown* opinion opened like an umbrella to bring these other matters under its shelter. Some friends of the Court complained about this evasion of responsibility.[97] Others, more result-oriented, and pleased with the result, criticized the critics.[98]

Whatever the propriety of the means, the Court made it clear through a series of unexplained decisions that the separate-but-equal notion was, indeed, dead. According to the Court, the state could not require segregation in public auditoriums,[99] on public beaches,[100] on municipal golf courses,[101] in state-sponsored athletic events,[102] in buses,[103] or even in jails.[104] The requirement of nonsegregated courtrooms was a fortiori.[105] The failure to desegregate public

95. THE SPIRIT OF LIBERTY 21 (2d ed. I. Dilliard 1953).

96. *See* cases cited in notes 99-106 *infra*.

97. *See, e.g.*, H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 30-31 (1961).

98. *See, e.g.*, E. ROSTOW, *American Legal Realism and the Sense of the Profession*, in THE SOVEREIGN PREROGATIVE 3, 25-39 (1962).

99. Muir v. Louisville Park Theatrical Assn., 347 U.S. 971 (1954); Schiro v. Bynum, 375 U.S. 395 (1964).

100. Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877 (1955).

101. Holmes v. City of Atlanta, 350 U.S. 879 (1955); New Orleans Park Assn. v. Detiege, 358 U.S. 54 (1958).

102. State Athletic Commn. v. Dorsey, 359 U.S. 533 (1959).

103. Gayle v. Browder, 352 U.S. 903 (1956), *overruling* Plessy v. Ferguson, 163 U.S. 537 (1896).

104. Lee v. Washington, 390 U.S. 333 (1968).

105. Johnson v. Virginia, 373 U.S. 61 (1963).

parks by 1963 finally evoked a full-dress opinion by a unanimous Court, but that opinion was directed solely to the issue of inordinate delay.[106] By 1963, the Court could properly rely on the fact that everyone knew or should have known that the result reached in *Brown*—if not its reasoning—governed the right of access to publicly owned and controlled facilities.[107]

The Court, however, was quickly moved into a new and even more difficult series of problems. Like the bans in the Bill of Rights, which are directed to actions of the national government and not to those of its citizens, so the equal protection clause of the fourteenth amendment is directed, by its terms, to the actions of states themselves and not to those of their residents. This restriction created hard issues for the Court in its attempts to solve the racial problems of the country, because the essence of racial discrimination was social, not political. No laws were required to effectuate segregation; it would exist without them. Jim Crow was not the creature of state governments; state governments were the creatures of Jim Crow. Litigation that resulted in a ban solely on state activity—even when the decrees were effective—could reach only the surface of the problem. The Court found itself compelled more and more to deal with the actions of individuals as though they were subject to the limitations of the fourteenth amendment. It made for the hardest kind of opinion writing, for it meant writing about one thing while acting on another.

Just as the Warren Court's predecessor had given it a leg up in the school segregation area, so too, in the area of state action, earlier Courts had started moving down the path in the direction that the Warren Court wanted to take. By the time of the Warren Court, it could be said that state action included not only activities carried out by governmental officials pursuant to a legislative mandate, but actions of officials even in contravention of state law,[108] actions of private citizens carrying out state functions,[109] and at least some actions of state courts in enforcing private agreements.[110] Still, these cases, like those to be decided by the Warren Court, afforded no clear rationale for the concept of state action.

In the 1956 term, the Court was faced with the question whether

106. Watson v. Memphis, 373 U.S. 526 (1963).

107. *See* 373 U.S. at 530 n.2.

108. *See, e.g.*, Screws v. United States, 325 U.S. 91 (1945).

109. *See, e.g.*, Smith v. Allwright, 321 U.S. 649 (1944); Marsh v. Alabama, 326 U.S. 501 (1946).

110. Shelley v. Kraemer, 334 U.S. 1 (1948).

a private school whose trustees were members of the Board of Directors of City Trusts, an official municipal agency, would be required to desegregate.[111] The segregation had resulted not from any decision of the Board of Directors, but because of the terms of the trust establishing the school. The Court held that, even though no discretion was exercised by the state to exclude Negroes, the state could not properly be the means for effecting such discrimination. Later, however, when the school was removed from the control of the official agency by action of the probate court, the Pennsylvania Supreme Court held that desegregation was no longer required; and the Supreme Court refused to review that decision.[112]

Then, in 1961, came *Burton v. Wilmington Parking Authority*.[113] A private restaurant in a municipally owned and operated parking facility, which was built on land condemned by the state and financed by tax-exempt bonds, refused service to a Negro. The Negro brought suit in the state courts seeking a declaratory judgment of his right to service, but the Delaware supreme court rejected his claim on the ground that the restaurant was acting in a "purely private capacity."[114] The Supreme Court of the United States reversed that decision and, in a rather murky opinion, held the discrimination unconstitutional. Without isolating the factors that transmuted the action of the restaurateur into state action, Justice Clark, for a divided Court, held that the whole situation amounted to state action:

> By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but it has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.
>
> Because readily applicable formulae may not be fashioned, the conclusion drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested. Owing to the very "largeness" of government, a multitude of relationships might

111. Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957).

112. Pennsylvania v. Board of Directors of City Trusts, 357 U.S. 570 (1958). Ultimately the school was desegregated by a reinterpretation of the trust by the Court of Appeals for the Third Circuit. Pennsylvania v. Brown, 392 F.2d 120 (3d Cir. 1968); *cf.* Sweet Briar Institute v. Button, 387 U.S. 423 (1967).

113. 365 U.S. 715.

114. 157 A.2d 894 (Del. 1960).

> appear to some to fall within the Amendment's embrace, but that it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present. Therefore respondents' prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation on appropriate facts fails to take into account "differences in circumstances [which] beget appropriate differences in law," *Whitney* v. *State Tax Comm'n*, 309 U.S. 530, 542. Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the prescriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.[115]

The Court's opinion in *Burton* is pregnant with possibilities for a broad expansion of the state action doctrine. But its concluding language made it unlikely that the case would spawn anything but further litigation.

At the following term of the Court, however, a case was disposed of on the authority of *Burton*, although the only analogous factor was that the restaurant was leased from a municipal facility. In *Turner v. Memphis*,[116] the appellant had not been refused service but had been offered segregated service. The result was, appropriately, the same. What was surprising was that the divided *Burton* Court had turned into a unanimous Court in disposing of the *Turner* case. This change could hardly be explained by the fact that the restaurant was located within a municipal facility, because that situation existed in both cases; but it might be explained by the fact that the restaurant in *Turner* was under compulsion to desegregate because of its airport location, a factor the Court did not mention.

The increasingly active nature of the Negro Revolution brought the Court more difficult problems in a series of "sit-in cases" in the 1962 term. In those cases, Negroes who had "sat in" at lunch counters and restaurants that had refused to serve them and had ordered them to leave had been convicted of criminal trespass under state laws. Here the restaurants were not located in state buildings or on state property. But while the earlier cases had involved relief sought by the persons discriminated against, in these cases it was the discriminating party who invoked the law that resulted in the criminal convictions.

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115. 365 U.S. at 725-26.

116. 369 U.S. 350 (1962).

In *Peterson v. City of Greenville*,[117] ten Negroes had refused to leave a lunch counter at an S. H. Kress store after service had been refused to them and the manager had ordered them to go. The manager called the police who arrested the Negroes for criminal trespass, and the Negroes were convicted. The manager said that he had ordered them to leave solely because they were Negroes; no other objection to their presence was offered. An ordinance of Greenville made it illegal to serve "white persons and colored persons in the same room [except] where separate facilities are furnished."[118] The Supreme Court's opinion, written by Chief Justice Warren for all the members of the Court except Harlan, upset the convictions entirely on the basis of the unconstitutionality of the ordinance. The Court conceded that the fourteenth amendment did not inhibit private conduct, but it stated that the restaurant's action in this case could not be considered private conduct:

> It cannot be denied that here the City of Greenville, an agency of the State, has provided by its ordinance that the decision as to whether a restaurant facility is to be operated on a desegregated basis is to be reserved to it. When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby "to a significant extent" has become "involved" in it, and, in fact, has removed the decision from the sphere of private choice. It has thus effectively determined that a person owning, managing or controlling an eating place is left with no choice of his own but must segregate his white and Negro patrons. The Kress management, in deciding to exclude Negroes, did precisely what the city law required.[119]

The decision in *Lombard v. Louisiana*,[120] decided the same day, was more difficult to reach. In that case, the defendants were convicted under the state "criminal mischief" statute for refusing to leave a lunch counter after being requested to do so. The Court, again speaking through Chief Justice Warren, managed to discover what it considered an equivalent of the ordinance in *Peterson* in proclamations issued by the mayor and chief of police to the effect that they would not condone sit-ins and would enforce the law against those who engaged in the practice:

> A State, or a city, may act as authoritatively through its executive

117. 373 U.S. 244 (1963).

118. Code of Greenville § 31-8 (1953), *as amended* (1958), quoted in 373 U.S. at 246-47.

119. 373 U.S. at 247-48.

120. 373 U.S. 267 (1963).

> as through its legislative body. . . . As we interpret the New Orleans city officials' statements, they here determined that the city would not permit Negroes to seek desegregated service in restaurants. Consequently, the city must be treated exactly as if it had an ordinance prohibiting such conduct.[121]

Justice Douglas, who joined Warren's opinion, was prepared to expand the state action doctrine considerably further. He would have found that any use of the state's judiciary to enforce private discrimination—at least in a place of public accommodations—was a violation of the fourteenth amendment. Moreover, he would have ruled that

> [t]his restaurant is . . . an instrumentality of the State since the State charges it with duties to the public and supervises its performance. The State's interest in and activity with regard to its restaurants extends far beyond any mere income-producing licensing requirement.[122]

Justice Harlan's separate opinion set forth the basis for his concern and for his unwillingness to join the opinions offered by the majority of the Court:

> Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.[123]

Harlan did not disagree, hardly anyone could, with the rationale of the Court in these cases, which was simply that state action encompassed action taken by individuals under the compulsion of state law. His concern came over the question whether there was such compulsion in the particular case. He agreed that there was in *Peterson*, but he felt that there was not in *Lombard*.

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121. 373 U.S. at 273.

122. 373 U.S. at 282-83.

123. Peterson v. City of Greenville, 373 U.S. 244, 250 (1963) (concurring in *Peterson*, dissenting in *Lombard*).

The problem of a lack of the traditional type of state action appeared on the Court's doorstep again in the 1963 term. The issue, phrased as narrowly as possible, was "whether the Fourteenth Amendment provides the Negro with a self-executing federal right to equal treatment by the proprietors of private establishments catering to all the public except Negroes."[124] Again the Court managed to evade the troublesome question, as it disposed of a series of cases on one ground or other that found state action elsewhere than in the judicial enforcement of the trespass laws. In *Robinson v. Florida*,[125] for example, the Court found that health regulations caused such burdens to desegregated restaurants that they, in effect, compelled the proprietors to exclude Negroes. In fact, however, the evidence in the case that the health regulations had anything to do with the segregation was no more than fanciful. In another case, the Court reversed the defendants' convictions on the equally ephemeral grounds that the defendants did not have adequate notice that they were breaking the law.[126] In a third case, the Supreme Court found the evidence insufficient to support the conviction, despite the state court's decisions to the contrary.[127] In still another decision, the Court pinned the responsibility for the exclusion on the state because the amusement park employee who issued the eviction notice was a deputy sheriff.[128] The opinions in these cases were not convincing of anything except the Court's patent desire to avoid deciding the troublesome question of the scope of state action for purposes of the fourteenth amendment. Any broadening of the state action concept to include the action of restaurant and amusement park proprietors would, as Harlan had suggested, have impinged on individual freedom of association. On the other hand, to permit the conviction of these peaceful demonstrators to stand would have caused the Court's collective gorge to rise.

The principal case on this issue during the 1963 term, *Bell v. Maryland*,[129] looked like a four-square confrontation. But that anticipation underestimated the Court's capacity for evasion. In *Bell*, twelve Negro students had been convicted under the state's criminal trespass laws for engaging in a restaurant sit-in. They

124. Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUP. CT. REV. 101.
125. 378 U.S. 153 (1964).
126. Bouie v. City of Columbia, 378 U.S. 347 (1964).
127. Barr v. City of Columbia, 378 U.S. 146 (1964).
128. Griffin v. Maryland, 378 U.S. 130 (1964).
129. 378 U.S. 226 (1964).

unsuccessfully challenged their convictions on both due process and equal protection grounds through the courts of Maryland. Justice Brennan, writing for the Court, did not "reach the questions that have been argued under the Equal Protection and Due Process Clauses of the Fourteenth Amendment."[130] Avoidance of the questions was based on the fact that, subsequent to the time at which the convictions were affirmed by the Maryland Court of Appeals, both a city ordinance and a state statute had been passed making it illegal to discriminate against Negroes in restaurants in the city and the state. It took some very fancy construction to read Maryland law as providing that a conviction which was affirmed by the highest state court was subject to attack on the ground that it was inconsistent with a subsequently enacted public-accommodations law. But the Supreme Court did not itself undertake to rewrite Maryland law. It sent the case back to the Maryland courts with a blueprint for doing so.

Although the majority opinion in *Bell* was supported by six members of the Court—the Chief Justice, Douglas, Clark, Brennan, Stewart, and Goldberg—several Justices spoke out on the substantive constitutional issues in their own separate opinions. Douglas, as he had earlier, was prepared to go as far as was necessary to inhibit discrimination in places of public accommodation. He was eager to do so especially because this important issue was not being faced by the legislative branch:

> We have in this case a question that is basic to our way of life and fundamental in our constitutional scheme. No question preoccupies the country more than this one; it is plainly justiciable; it presses for a decision one way or another; we should resolve it. The people should know that when filibusters occupy other forums, when oppressions are great, when the clash of authority between the individual and the State is severe, they can still get justice in the courts. When we default, as we do today, the prestige of law in the life of the Nation is weakened.[131]

The demands of justice were equally clear to Douglas. He would have utilized the equal protection clause to put "all restaurants . . . on an equal footing"[132] by making the state compel all of them to serve Negroes. What the state of Maryland did by legislative action, Douglas was prepared to have the Court do by constitutional compulsion. There is no conflict, he asserted, between the right

130. 378 U.S. at 228.

131. 378 U.S. at 244-45.

132. 378 U.S. at 246.

of the Negro to service and the personal preference of the restaurant owner not to serve him, because many, if not most, restaurants are owned by corporations: "Here, as in most of the sit-in cases before us, the refusal of service did not reflect 'personal prejudices' but business reasons. . . . The truth is, I think, that the corporate interest is in making money, not in protecting 'personal prejudices.' "[133] But even if the choice were between the personal prejudices of the storekeeper and the right of the Negro to service, the answer in Douglas' view should be the same. As President Johnson said in his State of the Union Message on January 8, 1964, "[s]urely [Negroes and whites] can work and eat and travel side by side in their own country."[134] Such rights are, for Douglas, federally created rights of citizenship that must be enforced: "Seldom have modern cases . . . so exalted property in suppression of individual rights."[135] "Apartheid"—a word Douglas reiterated—is barred by the common law and must not "be given constitutional sanction in the restaurant field."[136] There was, for Douglas, no problem concerning the existence of state action. Convictions for trespass, he stated, clearly fall within the ban of *Shelley v. Kraemer*:[137] "Why should we refuse to let state courts enforce *apartheid* in residential areas of our cities but let state courts enforce *apartheid* in restaurants? If a court decree is state action in one case, it is in the other. Property rights, so heavily underscored, are equally involved in each case."[138] To reject this theory, the Justice suggested, is to enhance the power of corporate management to a greater degree than ever before: *"Affirmance would make corporate management the arbiter of one of the deepest conflicts in our society . . . ."*[139] According to Douglas, most corporations are already suffering the results of absentee management. When "the corporation is little more than a veil for a man and wife or brother and brother . . . disregarding the corporate entity often is the instrument for achieving a just result. But the relegation of a Negro customer to second-class citizenship is not just. Nor is fastening *apartheid* on America a worthy occasion for tearing aside the corporate veil."[140]

Justice Goldberg, always a joiner, joined Douglas' opinion as

133. 378 U.S. at 246 (footnote omitted).
134. Quoted in 378 U.S. at 247.
135. 378 U.S. at 253.
136. 378 U.S. at 254.
137. 334 U.S. 1 (1948).
138. 378 U.S. at 259.
139. 378 U.S. at 264.
140. 378 U.S. at 271.

well as Brennan's. But he also proceeded to write one of his own in which he was joined by Douglas and the Chief Justice. Goldberg found the answer to the problem as much in the aura of the Constitution as in its words and its history. His novel argument was that the *Civil Rights Cases*[141] should be read as sustaining the conclusion that he and Douglas offered, since in those cases Justice Bradley had premised the Court's position on the assumption that "[i]nnkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them."[142] Goldberg obviously believed that, where this is untrue, as it is with regard to restaurants in most states, the *Civil Rights Cases* should be stood on their heads. In any event, he told us, John Marshall Harlan I, was right, and Bradley was wrong. There can be no recognized conflict, Goldberg continued, between the rights of Negroes to enjoy public accommodations and the rights of the owners to exclude Negroes. The owners have no such rights. In Goldberg's view, the Constitution commands that the state compel the owner to serve the Negro; it certainly cannot aid the owner in his refusal to do so by permitting him to invoke the state trespass laws. Indeed, Goldberg implied, if the owner resorts to self-help to remove the unwanted visitors from the premises, it is he and not the patron who should be subjected to the sanction of the laws. In the context of such a case, then, the constitutional right of privacy, which Goldberg was later to embrace with vigor,[143] was nowhere to be found:

> [Certainly there are] rights pertaining to privacy and private association . . . themselves constitutionally protected liberties.
>
> We deal here, however, with a claim of equal access to public accommodations. This is not a claim which significantly impinges upon personal associational interests; nor is it a claim infringing upon the control of private property not dedicated to public use. A judicial ruling on this claim inevitably involves the liberties and freedoms both of the restaurant proprietor and of the Negro citizen. . . . The history and purposes of the Fourteenth Amendment indicate, however, that the Amendment resolves this apparent conflict of liberties in favor of the Negro's right to equal public accommodations. . . . The broad acceptance of the public in this and in other restaurants clearly demonstrated that the proprietor's interest in private or unrestricted association is slight.[144]

141. 109 U.S. 3 (1883).

142. 109 U.S. at 25.

143. See Goldberg's opinion in Griswold v. Connecticut, 381 U.S. 479, 486 (1965), in which privacy becomes a ninth amendment right.

144. 378 U.S. at 313-14.

It came as a surprise to many that it was Justice Black who picked up the gauntlet thrown down by Douglas, Goldberg, and Warren. Black was joined by Harlan and White. For the senior Justice there was no state action in *Bell. Shelley v. Kraemer*, Black felt, was inapposite, for in that case, the Court properly held that

> state enforcement of the covenants had the effect of denying to the parties their federally guaranteed right to own, occupy, enjoy, and use their property without regard to race or color. . . . When an owner of property is willing to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866 . . . prohibits a State, whether through its legislature, executive, or judiciary, from preventing the sale on the grounds of the race or color of one of the parties.[145]

Obviously the same situation was not present in *Bell.* Black's interpretation of *Shelley* was interesting, but was certainly not the classic or even a persuasive one. Yet neither was the construction given by Douglas to the same case a convincing one. The Court, Justice Black went on, is not Congress; each has its own role to play:

> This Court has done much in carrying out its solemn duty to protect people from unlawful discrimination. And it will, of course, continue to carry out this duty in the future as it has in the past. But the Fourteenth Amendment of itself does not compel either a black man or a white man running his own private business to trade with anyone else against his will. . . . The case before us does not involve the power of the Congress to pass a law compelling privately owned businesses to refrain from discrimination on the basis of race and to trade with all if they trade with any. We express no views as to the power of Congress, acting under one or another provision of the Constitution, to prevent racial discrimination in the operation of privately owned businesses, nor upon any particular form of legislation to that end.[146]

Thus, the judicial phase of the right to equal treatment in places of public accommodation came to an end, with a majority of the Court never deciding the question on the merits. The Civil Rights Act of 1964[147] became law and, for a while, took the spotlight. The Civil Rights Act did not solve the problem of state action. It only amended it a bit. Since the Court could work only with the fourteenth amendment, the question which the Court faced was whether it could impose a rule of nondiscrimination on individuals

145. 378 U.S. at 330-31.

146. 378 U.S. at 342-43.

147. Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 241, codified in 5 U.S.C. §§ 2204-05 (1964), 28 U.S.C. § 1447(d) (1964), 42 U.S.C. §§ 1971, 1975a-d, 2000a to h-6 (1964).

solely because of the language and purpose of section 1 of that amendment. With the new statute, however, the question became whether Congress could impose such a rule of nondiscrimination. Two major differences were clear. Congress was not limited to the fourteenth amendment in seeking to eliminate discrimination; and congressional authorization under the fourteenth amendment came by way of section 5 as well as by reason of section 1. Whether section 5 authorized action that section 1 did not was a question that had not yet been answered by the Warren Court.[148]

It was with inordinate haste that the Civil Rights Act was tested in the Supreme Court. Seldom is a statute authoritatively validated by the Court in the same year that it is enacted into law. But that was the case with the Civil Rights Act. Section 201(a) of the law provides:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.[149]

The test cases involved a restaurant and a motel. Restaurants and motels were declared by the statute to be public accommodations within the meaning of the statute if their operations "affect commerce" or if they are supported by "State action."[150] Motels affect commerce by definition. Restaurants affect commerce if they serve or offer to serve food to interstate travelers or if "a substantial proportion of the food served" has "moved in interstate commerce."[151]

In *Heart of Atlanta Motel, Incorporated v. United States*,[152] the Court upheld the validity of the statute as applied to a motel because of the "overwhelming evidence" presented to Congress that racial discrimination in motels had an adverse effect on interstate commerce.[153] Some may find the evidence less than overwhelming, manufactured in some measure by federal executive officials at the command of their superiors. But it does not take overwhelming evidence to justify congressional findings of fact. Thus, the Court rested on the commerce clause rather than on the fourteenth

148. *See* Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81.

149. Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 243, 42 U.S.C. § 2000a(a) (1964).

150. Act of July 2, 1964, Pub. L. No. 88-352, § 201(b), 78 Stat. 243, 42 U.S.C. § 2000a(b) (1964).

151. Act of July 2, 1964, Pub. L. No. 88-352, § 201(c), 78 Stat. 243, 42 U.S.C. § 2000a(c) (1964).

152. 379 U.S. 241 (1964).

153. 379 U.S. at 253.

amendment to justify the federal rule of nondiscrimination in places of public accommodation.

Katzenbach v. McClung[154] involved a restaurant—Ollie's Barbecue. Again the evidence was far from "overwhelming" that "a substantial portion of food served" at Ollie's Barbecue came from interstate commerce, or that, if it did, the portion was of such magnitude as to affect interstate commerce. But the Court dispensed with this necessity by invoking the principles of *Wickard v. Filburn*.[155] Ollie's interstate purchases might be insignificant, but all barbecue stands together consume enough food through interstate commerce as to have a serious effect. Again there were findings of fact by Congress, dubious but desirable, that restaurants which discriminate sell less food than would nondiscriminatory restaurants, because interstate travel by Negroes was inhibited by discriminatory action which cut off part of the potential market. Since people tend to eat wherever they happen to be, however, it is not quite clear how interstate commerce would be enhanced by this compelled nondiscrimination. To the extent that they ate at Ollie's, they would be forsaking some other seller of the same kind of goods. But there is no arguing by the Court with Congress when Congress has reached conclusions that the Court admires. Indeed, the Court itself readily acknowledged that the objective of the statute was not really the enhancement of interstate commerce:

> In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.[156]

In any event, congressional motive is not a proper subject for judicial scrutiny.[157]

The reach of the commerce clause was not extended by these cases. The Supreme Court a score of years earlier had equated Congress' reach with its grasp.[158] Nor were there any strong judicial

154. 379 U.S. 294 (1964).

155. 317 U.S. 111 (1942).

156. 379 U.S. at 257.

157. *See* Alfange, *Free Speech and Symbolic Conduct: The Draft Card Burning Case*, 1968 SUP. CT. REV. 1.

158. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942); American Power & Light Co. v. SEC, 329 U.S. 90 (1946).

precedents in the way of the Court's conclusion. The *Civil Rights Cases*[159] declaring unconstitutional the 1875 statute attempting to impose integration on places of public accommodation had rested exclusively on a lack of power under the fourteenth amendment. Congress had not sought at that time to rest on the commerce clause, which had not yet taken on its expansive new meaning, nor had the Court examined the authority that might come from that clause.

The opinions in *McClung* and *Heart of Atlanta Motel* were not persuasive for the same reason that the earlier cases in the series were not persuasive. The result was good, but the Court was not facing the real issues, as the authors of the separate opinions made clear. Justice Douglas "would prefer to rest on the assertion of legislative power contained in § 5 of the Fourteenth Amendment . . . ." He believed that

> [a] decision based on the Fourteenth Amendment would have a more settling effect, making unnecessary litigation over whether a particular restaurant or inn is within the commerce definitions of the Act or whether a particular customer is an interstate traveler. Under my construction, the Act would apply to all customers in all the enumerated places of public accommodation. And that construction would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American history.[160]

It is doubtful, however, that reliance on the fourteenth amendment would have been more effective than reliance on the commerce clause. The requirements for inclusion in the commerce clause were so easily met as to be mere paper demands, What Douglas was anxious to do was to reassert the proposition that any judicial enforcement of discriminatory acts qualified for state action under the rule in *Shelley v. Kraemer.* His position had not changed since his opinion in *Bell v. Maryland.* Justice Goldberg, too, wrote a separate opinion reasserting his notions of state action as he had stated them in *Bell v. Maryland.* There were no dissenting opinions or votes in either *McClung* or *Heart of Atlanta Motel.* Thus, the congressional power was unanimously sustained, but there was still no rationale for the state action concept. And the rationale remained important, for the statute by no means sought to put an end to all discrimination based on race or color.

The Court was still not off the hook. There was a plethora of cases of convictions under state trespass statutes that had been decided

159. 109 U.S. 3 (1883).

160. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 280 (1964) (concurring opinion).

prior to the enactment of the 1964 Act. Some of them were on their way to the Supreme Court—indeed, some had arrived—before the legislation was enacted. If the Court were compelled to decide these cases without resort to the Civil Rights Act, it might have to answer the thorny problem that it had so long evaded.

Hamm v. City of Rock Hill[161] raised just those issues. The Civil Rights Act provides in section 203(c), that "[n]o person shall . . . punish any person for exercising or attempting to exercise any right or privilege secured by section 201 . . . ."[162] Clearly, convictions resulting from acts committed after the passage of the statute would not be sustained. But what about the cases resulting in judgments prior to the passage of the Act? Justice Clark, writing for the majority, asserted that if these cases had arisen in the federal courts prior to the passage of the statute, they would, under common-law doctrine, abate by reason of the statute. He then concluded that cases arising in state courts should be decided no differently. His strongest argument for this conclusion was that it avoided the need to decide a constitutional question. Justice Black dissented:

> The Civil Rights Act of 1964, validly, I think, made it unlawful for certain restaurants thereafter to refuse to serve food to colored people because of their color. The Court now interprets the Act as a command making it unlawful for the States to prosecute and convict "sit-in" demonstrators who had violated valid state trespass laws prior to passage of the federal Act. The idea that Congress has the power to accomplish such a result has no precedent, so far as I know, in the nearly 200 years that Congress has been in existence.
>
> . . . .
>
> . . . The judge-made "common law rule" of construction on which the Court relies has been applied heretofore only where there was a repeal of one statute by another—not, as my Brother Harlan points out, where as here a later law passed by Congress places certain restrictions on the operation of the still valid law of a State. But even if the old common-law rule of construction taken alone would otherwise have abated these convictions, Congress nearly a century ago passed a "saving" statute . . . to keep courts from imputing to it an intent to abate cases retroactively, unless such an intent was expressly stated in the law it passed.[163]

There was, he stated, nothing in the legislative history to impute to Congress an intention to abate these convictions. Justices Harlan, Stewart, and White wrote opinions in agreement with Black's con-

161. 379 U.S. 306 (1964).

162. Act of July 2, 1964, Pub. L. No. 88-352, § 203(c), 78 Stat. 244, 42 U.S.C. § 2000a-2 (1964).

163. 379 U.S. at 318-19.

clusions. Thus, by a single vote, the definition of state action was once again evaded.

In the 1965 term, the Court began a revival and a reinvigoration of Reconstruction era laws. If it could not find the tools to protect and secure Negro equality in the fourteenth amendment itself, the Court would find them in the exercise of legislative power by Congress. If it could not find them in new congressional legislation, it would find them in old legislation. So far as the reduction of state authority and the enhancement of national power were concerned, it made no difference which branch of the national government was the instrument of change. But reliance by the Court on congressional authority left with the legislature the penultimate authority to change the legislation on which the Court was relying. That authority, of course, was subject to the Court's ultimate power of statutory interpretation and judicial review.[164]

Two cases that were before the Court in 1965 arose out of the attempted application of Reconstruction era laws to two lynchings in the South—one involving the lynching of three white civil rights workers in Mississippi, the other the lynching of a Negro civil rights leader in Georgia. Both cases came to the Court by direct appeal under the Criminal Appeals Act, with the consequence that the Court was free to speculate about the facts and was not confined to the proof on the record. The relevant statutory provisions are found in sections 241 and 242 of title 18, which read as follows:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined not more than $5,000 or imprisoned not more than ten years or both.[165]

> Whoever, under color of any law, statute, ordinance, or custom, wilfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both.[166]

164. *See* Burt, *supra* note 148.

165. 18 U.S.C. § 241 (1964).

166. 18 U.S.C. § 242 (1964).

These sections are a potpourri of the post–Civil War acts now codified in title 18.

United States v. Price[167] was concerned with the constitutional validity of an indictment under section 242 of three police officials and fifteen private citizens for conspiring to interfere with and interfering with the rights of the deceased to due process of law by murdering them. The trial court had dismissed the section 242 count of the indictment as to the individual defendants on the ground that they were not acting under color of law. The Supreme Court reversed this judgment in an opinion by Justice Fortas, speaking for a unanimous Court:

> In the present case, according to the indictment, the brutal joint adventure was made possible by state detention and calculated release of the prisoners by an officer of the State. This action, clearly attributable to the State, was part of the monstrous design described by the indictment. State officers participated in every phase of the alleged venture: the release from jail, the interception, assault and murder. It was a joint activity from start to finish. Those who took advantage of participation by state officers in accomplishment of the foul purpose alleged must suffer the consequences of that participation. In effect, if the allegations are true, they were participants in official lawlessness, acting in willful concert with state officers and hence under color of law.[168]

The trial court had also dismissed the section 241 counts as to all parties on the ground that "due process of law" is not a "right or privilege secured to [an individual] by the Constitution." Once again, the Court reversed, but this time it had to overcome the barrier of an earlier opinion which it dealt with in a forthright manner:

> The argument, however, of Mr. Justice Frankfurter's opinion in *Williams I* [*United States v. Williams*, 341 U.S. 70 (1951)], upon which the District Court rests its decision, cuts beneath this. It does not deny that the accused conduct is within the scope of the Fourteenth Amendment, but it contends that in enacting § 241, the Congress intended to include only the rights and privileges conferred on the citizen by reason of the "substantive" powers of the Federal Government—that is, by reason of federal power operating directly upon the citizen and not merely by means of prohibitions of state action. . . . We do not agree.
>
> The language of § 241 is plain and unlimited. . . . [I]ts language embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States. There is no indication in the language that the sweep of the section is confined to rights that are conferred or "flow from" the Federal Govern-

167. 383 U.S. 787 (1966).

168. 383 U.S. at 795.

ment, as distinguished from those secured or confirmed or guaranteed by the Constitution.[169]

Despite the plain meaning of the words, this case marked the first time that section 241 had been so broadly construed. But the Court, while expanding its own jurisdiction, was essentially placing a tool within the hands of the federal executive. For prosecutorial discretion, which had made a dead letter of these sections for so many years, would still be determinative of the use to which they would be put. The Court, moreover, was fully conversant with the problem of federalism inherent in the case. It denied new incursions on the state domain but nevertheless justified them:

> The present application of the statutes at issue does not raise fundamental questions of federal-state relationships. We are here concerned with allegations which squarely and indisputably involve state action in direct violation of the mandate of the Fourteenth Amendment—that no State shall deprive any person of life or liberty without due process of law. This is a direct, traditional concern of the Federal Government. It is an area in which the federal interest has existed for at least a century, and in which federal participation has intensified as part of a renewed emphasis upon civil rights. . . . In any event, the problem, being statutory and not constitutional, is ultimately, as it was in the beginning, susceptible of congressional disposition.[170]

United States v. Guest[171] was a more controversial case. Nevertheless, it established, even if by indirection, the expansive powers of Congress under section 5 of the fourteenth amendment to affect individual action which is unrelated to the state action required by section 1. In *Guest*, the victim had been murdered while traveling between states, and the defendants were charged with conspiracy to effect the killing in violation of section 241. One of those violations was the deprivation of the victim's rights to equal protection of the laws as guaranteed by the fourteenth amendment. The Court, speaking through Justice Stewart, ruled that the rights protected by the equal protection clause, no less than those secured by the due process clause, were encompassed by the statute. The difficulty with the case, however, was that there were no state officials implicated in the conspiracy. The problem, then, was to find state action sufficient to meet the requirements of the fourteenth amendment, for the Court asserted that state action was necessary if there was to be any violation of the equal protection clause:

169. 383 U.S. at 800-01.

170. 383 U.S. at 806-07.

171. 383 U.S. 745 (1966).

> It is a commonplace that rights under the Equal Protection Clause itself arise only when there has been involvement of the State or of one acting under the color of its authority. The Equal Protection Clause "does not . . . add any thing to the rights which one citizen has under the Constitution against another." . . . As MR. JUSTICE DOUGLAS more recently put it, "The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*." . . . This has been the view of the Court from the beginning. . . . It remains the Court's view today.[172]

But the Court was capable of finding the necessary element of state action even here:

> This case, however, requires no determination of the threshold level that state action must attain in order to create rights under the Equal Protection Clause. This is so because, contrary to the argument of the litigants, the indictment in fact contains an express allegation of state involvement sufficient at least to require the denial of a motion to dismiss. One of the means of accomplishing the object of the conspiracy, according to the indictment, was "By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts." . . . The allegation of the extent of official involvement in the present case is not clear. It may charge no more than co-operative private and state action similar to that involved in *Bell*, but it may go considerably further. For example, the allegation is broad enough to cover a charge of active connivance by agents of the State in the making of the "false reports," or other conduct amounting to official discrimination clearly sufficient to constitute denial of rights protected by the Equal Protection Clause. Although it is possible that a bill of particulars, or the proof if the case goes to trial, would disclose no co-operative action of that kind by officials of the State, the allegation is enough to prevent dismissal of this branch of the indictment.[173]

Another count of the indictment accused the defendants of interfering with the deceased's "right to travel." The trial court's dismissal of this count was also upset. The right to travel, said the Court, is a federally created right, derivable from some unsuspected place in the Constitution.[174] According to the Court, the only limitation on the invocation of section 241 as a means for punishing individual action in restraint of federal rights is a requirement that there must be proof of "specific intent to interfere with the federal right."[175] Harlan, concurring in part and dissenting in part, was the only member of the Court who objected to the creation of the right

172. 383 U.S. at 755.
173. 383 U.S. at 756-57.
174. 383 U.S. at 757, 759.
175. 383 U.S. at 760.

to travel as a federally created right separate and apart from the freedom from state interference with interstate commerce. He reminded the Court that it was a criminal statute that it was construing:

> Although the Court has ostensibly only "discovered" this private right in the Constitution and then applied § 241 mechanically to punish those who conspire to threaten it, it should be recognized that what the Court has in effect done is to use this all-encompassing criminal statute to fashion federal common-law crimes, forbidden to the federal judiciary since the 1812 decision in *United States* v. *Hudson*, 7 Cranch 32. My Brother Douglas, dissenting in *United States* v. *Classic* [313 U.S. 299 (1941)], noted well the dangers of the indiscriminate application of § 241: "It is not enough for us to find in the vague penumbra of a statute some offense about which Congress could have legislated, and then to particularize it as a crime because it is highly offensive." 313 U.S. at 331-32.
>
> I do not gainsay that the immunities and commerce provisions of the Constitution leave the way open for the finding of this "private" constitutional right, since they do not speak solely in terms of governmental action. Nevertheless, I think it wrong to sustain a criminal indictment on such an uncertain ground. To do so subjects § 241 to serious challenge on the score of vagueness and serves in effect to place this Court in the position of making criminal law under the name of constitutional interpretation. It is difficult to subdue misgivings about the potentialities of this decision.[176]

The Warren Court, in particular, had been most stringent in imposing on the state legislatures and on Congress a duty to cross their t's and dot their i's in their statutes lest they find those statutes struck down for vagueness.[177] That the members of the Court were prepared to sustain a statute by construing it as broadly as they did this one in *Guest* underscores the absence of an objective test for vagueness.[178]

The *Guest* case was important as establishing a power in the federal courts, in addition to that in the national legislature, to make federal crimes out of what had been, for the most part, infringements of state law. But it was also important because six

176. 383 U.S. at 773-74.

177. *Cf., e.g.*, Whitehill v. Elkins, 289 U.S. 54 (1967) (loyalty oath); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (loyalty oath); Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964) (loyalty oath); Cramp v. Board of Instruction, 368 U.S. 278 (1961) (loyalty oath); United States v. Robel, 389 U.S. 258 (1967) (freedom of association); NAACP v. Button, 371 U.S. 415 (1963) (freedom of association); Shelton v. Tucker, 364 U.S. 479 (1960) (freedom of association); Cox v. Louisiana, 379 U.S. 536 (1965) (civil rights demonstration); Edwards v. South Carolina, 372 U.S. 229 (1963) (civil rights demonstration).

178. A keen analysis of the partisan use of the void-for-vagueness doctrine may be found in Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75-85, 98-115 (1960).

members of the Court, in concurring opinions, established the scope of section 5 of the fourteenth amendment as reaching beyond the limitation of state action. Justice Clark, speaking also for Justices Black and Fortas, said: "[I]t is, I believe, both appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights."[179] The left wing of the Court—Brennan, Warren, and Douglas—reiterated the proposition that section 5 authorizes Congress to act without the restraints of the state action requirement. They had no need to conjure up the existence of state action in this case, as Stewart did. For them, section 5 is to the fourteenth amendment what the necessary and proper clause is to article I.

Thus was the license issued to Congress. Whether Congress needed the authority is another question. With the power over commerce and the power over the purse, it had tools at its command that did not have the Achilles heel of requiring a jury from the vicinage to find defendants guilty.

Guest, however, was not the Warren Court's last word on the subject of state action. That bête noire raised its ugly head again in the Court's 1966 term. *Reitman v. Mulkey*[180] further confounded the confusion. California had adopted by referendum a constitutional provision that, in effect, banned all open-housing legislation, state and local, within that state.[181] The California legislature had itself passed two open-housing statutes that were purportedly invalidated by the constitutional change. Suit was brought in the state courts challenging the validity of the adoption of Proposition 14—the constitutional amendment—as violative of the fourteenth amendment. The Supreme Court of California held that Proposition 14 did violate the fourteenth amendment, but the court did not really say why.[182] The United States Supreme Court affirmed that judgment in *Reitman v. Mulkey,* but it too did not really say why. As has been stated by two staunch supporters of the Supreme Court and the conclusion that it reached,

> the Court in *Reitman v. Mulkey* settled for an opinion that utterly failed to justify its decision. The principal alternatives available to the Court—assuming a decision to affirm the California court—were to affirm without opinion, to tackle the issue of substantive equal

179. 383 U.S. at 762.

180. 387 U.S. 369 (1967).

181. CALIF. CONST. art. I, § 26.

182. Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966).

> protection head on, or to temporize, avoiding the unavoidable by fudging. It is not shocking that the Court chose the last path.[183]

By "substantive equal protection," the writers obviously meant an imposition of the Court's values under the label of equal protection —a process similar to that in which an earlier Court had engaged under the title of substantive due process. It is a dangerous game, but there are few who deny the Court's engagement in it. Nevertheless, the search for a rationale must continue, either in order to afford guidance for future decision or in order to save the Court from self-destruction. The only articulated reasoning in support of *Reitman* that sounds at all persuasive was provided by Professor Charles Black, whose personal inclinations are to eliminate the whole state action concept as an unnecessary barrier to the eradication of racial discrimination. He offered an explanation which is consistent with the precedents and which is far more convincing than anything that the high courts of California or the United States could produce:

> The decision in *Reitman v. Mulkey* is apt to be widely misunderstood, because both those who like it, and those who do not, are powerfully impelled to see it as holding more than it did—the former because a broad reading could open the way to attack on many more difficult situations in the field of housing and elsewhere, and the latter because a broad holding is easier, in the present state of professional thought, to assail and discredit. The broader holding would have rested on the ground that the repeal of the fair housing law was itself the state action which denied equal protection. Further, since the distinction between states which up to now have, and those which up to now have not, enacted fair housing laws would seem to be unacceptable as a criterion of state obligation, it ought to follow that all states have a duty to enact fair housing laws, and that if they do not the discrimination thus made possible is to be seen as sanctioned by their omission, and hence as infected with a forbidden state complicity that calls down the ban of the fourteenth amendment. State "neutrality," the holders of this view would insist, is not possible —or, if possible, is not a sufficient fulfillment of the "equal protection" obligation. . . .
>
> The rule which I would propose, then, as a basis for the *Reitman* decision, is that where a racial group is in a political duel with those who would explicitly discriminate against it as a racial group, and where the regulatory action the racial group wants is of full and undoubted federal constitutionality, the state may not place in the way of the racial minority's attaining its political goal any barriers which, within the state's political system taken as a whole, are especially difficult of surmounting, by comparison with those barriers

183. Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 76.

> that normally stand in the way of those who wish to use political processes to get what they want.[184]

According to Professor Black, then, a state requirement that a majority of all the state's voters must approve any state or local open-housing legislation constitutes the state action that deprives the Negro of equal protection of the laws. Most other pressure groups do not have to meet that additional requirement on the state level, much less on the local level. Indeed, Proposition 14 does smack of changing the rules in the middle of the game, which no one would regard as affording equal protection. Let none be bemused, however, by the notion that Professor Black's suggestions would afford a precedent of narrow limits. Its consequences, if not so great as placing an affirmative burden on the state to provide open housing, would be felt in the destruction of many state constitutional provisions now on the books, for, as Professor Black noted in the first paragraph quoted above, to draw a line between provisions enacted now to establish barriers to political efforts by Negroes to secure their rights and those enacted some time ago would be difficult to justify.

The capstone of the Supreme Court's shaky edifice was *Jones v. Alfred H. Mayer Company*,[185] which may have the effect of the last straw on the camel's back. It did not provide the long-sought rationale for state action, but it may have made that rationale irrelevant. The plaintiffs, a Negro man and his white wife, sought an injunction and damages against the defendant for its refusal to sell them a house solely on the ground of the would-be buyers' color. The Court held that plaintiffs were entitled to the relief sought, pursuant to a long dormant 1866 statute. It held further that the statute itself was a proper exercise of congressional power under the thirteenth amendment which, of course, is not entailed with a state action clause. The potentialities of the combination of holdings are great.

The 1866 statute, as set out in the United States Code, provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property.[186]

184. Black, *"State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 73, 82 (1964). How far better Professor Black's approach is than that taken by the Court in Hunter v. Erickson, 393 U.S. 385 (1969) (amendment to city charter which rendered a fair-housing ordinance ineffective held denial of equal protection).

185. 382 U.S. 409 (1968).

186. 42 U.S.C. § 1982 (1964).

Given the historical background of the 1866 legislation, one might readily conclude that the statute removed the legal disabilities that had theretofore been imposed on Negroes in all parts of the country, but especially in the South. Instead of doing so, however, the Court derived from the statute an obligation on the part of an individual seller not to discriminate against potential purchasers by reason of their race. The means for achieving this worthy goal were dubious logic and abominable history, all carefully documented by Professor Casper.[187]

Perhaps the important thing with respect to the *Jones* case, however, is not the poor credentials that the opinion carries, but its potential utilization which would make unnecessary much of the recent civil rights legislation or any further congressional action in this sphere. Still, in terms of additional remedies, the contemporary legislation could prove important, for it calls into play the forces of the national government to vindicate the rights granted, whereas the 1866 statute depends on self-help by the injured party. On the other hand, the new legislation has a narrower scope than has the broadly drawn Reconstruction model as interpreted by the Supreme Court. Professor Henkin has explained the *Jones v. Alfred H. Mayer Company* potential this way:

> Indeed, does not the Court's reading render superfluous the Civil Rights Act of 1964? Title II of that Act provides that certain places of public accommodation may not discriminate on the basis of race in selling goods and services; the Court's construction of section 1982, when applied to personal property, renders the title (and its limitations) superfluous. Moreover, by the Court's technique of construction, the right "to make and enforce contracts" guaranteed by the 1866 Act should prevent a restaurant or hotel management from refusing on the grounds of race to "make a contract" for service with a Negro. Indeed, that construction should prevent any employer from refusing "to make a contract" of employment with a Negro; and the fair employment provisions of the 1964 Act likewise become superfluous, as does the entire struggle, since the days of the New Deal, to enact fair employment legislation.
>
> One should also mention the Fair Housing title of the Civil Rights Act of 1968. The majority of the Court rightly says that it is broader in coverage and in remedy than the 1866 statute as now interpreted. [This clearly overlooks the exemptions contained in the 1968 Act that are not to be found in the 1866 statute.] But Congress had made a substantial contribution towards open housing, and one may properly ask why the Court could not resist the temptation to find in the earlier act what, by a fair reading, no Congress ever put there.

187. Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89.

> The Court failed to distinguish between what meaning words will carry and what they will not, between interpretation and perversion, between the judicial function and that of Congress. And for the majority to assert that it is " 'not at liberty to seek ingenious analytical instruments' . . . to carve from § 1982 an exception for private conduct" is surely disingenuous, and borders on *chutzpah*.[188]

The result of this long series of Supreme Court decisions is that Congress is empowered, under the commerce clause, the thirteenth amendment, the fourteenth amendment, and, as will be seen,[189] the fifteenth amendment, to legislate against either public or private discrimination. That this result is desirable ought not be doubted. That it is legitimate is not so easily established. More important, however, is the weaponry that the Court has placed at its own disposal. Besides the clear mandates of the recent civil rights legislation, there are the even broader authorizations to be garnered from the revivified Reconstruction legislation. That earlier legislation includes not only the 1866 statute relied on in *Jones v. Alfred H. Mayer Company*, not only the criminal sanctions justified in *Guest* and *Price*; but also, presumably, the Civil Rights Act of 1875,[190] erroneously invalidated in the *Civil Rights Cases*;[191] the 1870 statute,[192] erroneously invalidated in *United States v. Reese*,[193] *Hodges v. United States*,[194] and *James v. Bowman*;[195] and the 1871 statute,[196] erroneously invalidated in *United States v. Harris*.[197]

The cases which I have detailed at some length represent, to my mind, the very heart of the Warren Court's effort. It is on these cases that its claim on history will ultimately depend. Even before most of them were decided—indeed, just two years after *Brown*—Justice Douglas coolly announced their success in one of his extracurricular efforts. In 1956, he wrote of American Negroes:

> [T]heir right to equality of treatment has at last been realized. No minority in any country has progressed so far in the same length of time as the American Negro. Today he sits in our legislatures, on our school boards, on many of the administrative agencies, and

188. Henkin, *On Drawing Lines*, 82 HARV. L. REV. 63, 85-86 (1968).
189. *See* text accompanying notes 242-43 *infra*.
190. Act of March 1, 1875, ch. 114, §§ 1-2, 18 Stat. 336.
191. 109 U.S. 3 (1883).
192. Act of May 31, 1870, ch. 114, §§ 3-4, 19, 16 Stat. 140-41, 144.
193. 92 U.S. 214 (1876).
194. 203 U.S. 1 (1906).
195. 190 U.S. 127 (1903).
196. Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13.
197. 106 U.S. 629 (1883).

> on our courts. He is present in every profession and calling; he is an honored member of the American community.[198]

If medals were awarded for optimism, the good Justice earned his at that time.

It is true that once segregation has been found to be violative of the equal protection clause, the cases in which a state or local government openly distinguished among its residents on the basis of race presented little difficulty for decision. Invidious discrimination by governments created problems only in ascertaining the facts. Any of these cases could have been settled by adoption of the first Justice Harlan's famous but simple credo: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[199] It is of the essence of the equal protection clause that certain classifications made by governments are invalid, and it would have indeed been simple to establish the rule that any classification based on race or color is invalid. But the Warren Court never accepted that proposition. In *McLaughlin v. Florida*,[200] for example, Justice White, in striking down a criminal anticohabitation statute that imposed higher penalties on Negro or mixed couples than on all-white couples, stated the limits of the Court's rule:

> [W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classification "constitutionally suspect," *Bolling* v. *Sharpe*, 347 U.S. 497, 449; and subject to the "most rigid scrutiny," *Korematsu* v. *United States*, 323 U.S. 214, 216; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, *Hirabayashi* v. *United States*, 320 U.S. 81, 100.[201]

The reference to the Japanese exclusion cases served only to underline the difference between the presumption and an inflexible rule.

There were three sets of hard problems presented to the Court by the Negro Revolution cases. The Court confronted two of those problems but it avoided a third. The first was the extent to which the Court, solely by reason of the equal protection clause, would inhibit individual acts of discrimination. Certainly the extension of the state action concept was only the other side of this coin. This was a hard problem because, like it or not, it is here that the prin-

198. W. DOUGLAS, WE THE JUDGES 19 (1956).

199. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (dissenting opinion).

200. 379 U.S. 184 (1964).

201. 379 U.S. at 191-92.

ciple of equality comes into conflict with the principle of individual freedom—freedom to do even those acts that we most sincerely deplore. The second question concerned the degree to which Congress is empowered, under section 5 of the fourteenth amendment or by other constitutional provisions, to compel individuals to behave in a nondiscriminatory manner. Stated in other words, the question was how far the Court would allow Congress to go in choosing between equality on the one hand and freedom to discriminate on the other. The Court had no difficulty whatsoever in deciding that Congress could ban discrimination in areas that it was reluctant to take under its own control. The third problem—the unresolved one—was the extent to which a governmental body is free to indulge in "reverse discrimination," that is, to classify by race for the purpose of bestowing greater benefits, or imposing lesser burdens, on a minority than on a majority. This problem is probably the one that will have to be faced by the Warren Court's successor as the nation tries to avoid the doleful prophecies of Tocqueville.[202]

A look at the essence of the equal protection clause and its means of fulfillment may help to clarify the "reverse discrimination" problem, if not the solutions. The purpose of the clause was to prevent majorities from imposing on minorities by way of laws that provide different rules for the one than for the other. The ancient concept of equality before the law that underlay the Declaration of Independence also supported the equal protection clause. If a majority is compelled to treat a minority exactly as it treats itself, adequate protection to minority interests is ensured by the self-interest of the majority. Justice Jackson stated this proposition in his characteristically direct fashion in *Railway Express Agency v. New York*:[203]

> I regard it as a salutary doctrine that cities, states and the Federal Goverment must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose on a minority must be imposed generally. Conversely, nothing opens

202. *See* text accompanying notes 58-59 *supra*. I am again reminded of Justice Holmes' words: "Our system of morality is a body of imperfect social generalizations expressed in terms of emotion. To get at its truth, it is useful to omit the emotion and ask ourselves what those generalizations are and how far they are confirmed by fact accurately ascertained." O. HOLMES, COLLECTED LEGAL PAPERS 306 (1920).

203. 336 U.S. 106 (1949).

> the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that they be equal in operation.[204]

Once the rule is recognized as one created for the protection of minorities, the role of the legislature with regard to the "benevolent quota" may become clearer, so long as we are also prepared to accede to the proposition that the legislature is the voice of the majority. The rule of equality commanded by the equal protection clause is binding on the courts. But, as with almost every other constitutional right, it should be treated as waivable by knowing affirmative action. Enactment of legislation favoring a minority may be treated as such a waiver by the majority of its right to equal treatment. Whether section 5 authorizes this waiver or whether some other provision of the Constitution must be found is not a pressing question, since the national legislature's power is now plenary except insofar as it may violate the provisions of the Bill of Rights or other specific restraints of the Constitution. Yet the Supreme Court has no right to compel such waiver, and the discretion to withdraw the waiver by means of later legislation imposing a rule of equality remains with the legislature so long as the Constitution does not restrain that discretion. The Court is the voice of the Constitution; it is not the voice of the majority.

If this analysis were accepted, there would be little problem with the open question of legislative power to invoke "inverse discrimination." The thesis will not, however, support judicial or administrative use of "inverse discrimination," since neither of those branches—except perhaps for the President himself—is entitled to speak for the people, and the necessary-and-proper clause makes me doubt that even the President can speak for the citizenry. On the other hand, even the legislature cannot waive the right of the minority to equal treatment, for by definition the legislature can enact legislation only as a representative of the majority. There remain problems, of course, but they are the kind of problems that the Court must always face in applying the equal protection clause: how do you define a majority, when is a quota beneficent, and so on. This thesis, I submit, has been tested hundreds of times a year by the passage of private bills affording special treatment to a minority, usually a minority of one.

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204. 336 U.S. at 112-13.

Professor Freund has reached the same conclusion about "beneficent quotas," but by a different route:

> Suppose . . . that the question of preference is raised without evasion. To characterize a preference as compensatory is hardly a satisfying answer to all the complexities. . . .
>
> But the concept of compensation does suggest some possible differentiations or gradations in the problem of preference. Where the government itself was responsible for discrimination in the past, there is a better case for its reverse preference now. So, too, where the preference is, so to speak, transitional, by way of preparing the members of the group to be treated as individuals. And it is the easier to justify a preference the less positive harm to others; easier to justify additional attention in schooling than a competitive preference in the job market. Moreover there is an ethical sense in which discrimination in favor of a minority is not to be equated with a discrimination against it. . . . If this is a sound moral judgment, it is relevant to the judgment of the law as well, for equal protection of the law is at bottom the embodiment of a moral standard.[205]

The essential difficulty about inroads in individual freedoms is not resolved, however, by appeal to the purpose or the morality of the equal protection clause. The problem essentially will have to be resolved under other provisions of the Constitution. Thus far, the Court has treated it too cavalierly. If Congress has authority to act by reason of section 5 of the fourteenth amendment or otherwise, it may still do so only within the confines of stated constitutional limitations. Clearly it cannot do so by infringing an individual's rights to freedom of speech, to a jury trial, to due process of law (with all its ambiguities), or to rights created by the "penumbra" of the Bill of Rights.[206] In these situations it is the Court that will have to do the weighing, and let no one say that the Court's discretion is not invoked when two constitutional rights come into conflict. It might be asked that the Court do the weighing publicly and state the reasons for its choice, however difficult such a task might be. The invocation of absolutes is hardly responsive.

Like the cases concerned with the Negro Revolution, the reapportionment cases[207] rested on the equal protection clause. But unlike

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205. Freund, *The Civil Rights Movement and the Frontiers of Law*, in THE NEGRO AMERICAN 366-67 (T. Parsons & K. Clark ed. 1966).

206. C. PRITCHETT, THE AMERICAN CONSTITUTION 686 (2d ed. 1968):

> *Griswold v. Connecticut* [381 U.S. 479] (1965) saw the Court in a most creative mood. It wanted to argue with a legislature, but it had no specific constitutional provisions on which to base its argument. And so it created a constitutional foundation for its position, just as it had done with substantive due process three-quarters of a century earlier.

207. Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633

the racial discrimination cases, the reapportionment cases were concerned more with form than they were with substance. They represent a sterile concept of equality for the sake of equality. Given the premises of "one man–one vote" and "one vote–one value," the Court needed nothing more for its decision than the principle of *reductio ad absurdum*. There is an element of *Catch-22* in the opinions in these cases. The Court has repeatedly said that justifiable deviations from the arithmetical formula will be tolerated, but it has yet to accept any justification proffered.

Yet these cases must be marked as a judicial success inasmuch as compliance has readily occurred and the public is quiescent if not acquiescent. Still, if there were goals to be achieved aside from the possibly aesthetic one of seeing every electoral district containing the same number of voters, more doubts about the Court's accomplishments might be expressed. If the Court's objective was the revival of state legislatures, it has failed; state legislatures remain moribund. If its objective was the transfer of power from rural to urban voters, it has failed; the beneficiaries of the transfer have largely been the reactionary suburbs. If its objective was to secure more meaningful representation, it has failed for the simple reason that arithmetic has no sense of community.[208]

The equal protection clause was not a powerful weapon of the Warren Court in the other major field of its effort—the reform of criminal procedure. Aside from the jury selection cases, in which the Court upset the selection process in every case it accepted for review,[209] the equal protection clause was utilized only to support the doctrine of *Griffin v. Illinois*[210] which sought to ensure equality between poor and rich in the conduct of appeals,[211] including access to appellate counsel.[212] At the substantive level, the equal protection

(1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sencock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713 (1964).

208. *See* Dixon, *The Warren Court Crusade for the Holy Grail of "One Man-One Vote"*, 1969 SUP. CT. REV. 219.

209. Hernandez v. Texas, 347 U.S. 475 (1954) (Mexicans); Eubanks v. Louisiana, 356 U.S. 584 (1958); Arnold v. North Carolina, 376 U.S. 772 (1964); Whitus v. Georgia, 385 U.S. 545 (1967); Coleman v. Alabama, 389 U.S. 22 (1967); Sims v. Georgia, 389 U.S. 404 (1967).

210. 351 U.S. 12 (1956).

211. Douglas v. Green, 363 U.S. 192 (1960); McCrary v. Indiana, 364 U.S. 277 (1960); Smith v. Bennett, 365 U.S. 708 (1961); Lane v. Brown, 372 U.S. 477 (1963); Draper v. Washington, 372 U.S. 487 (1963); Norvell v. Illinois, 373 U.S. 420 (1963); Long v. District Ct. of Iowa, 385 U.S. 192 (1966); Roberts v. La Vallee, 389 U.S. 40 (1967); Williams v. Oklahoma City, 395 U.S. 458 (1969).

212. Douglas v. California, 372 U.S. 353 (1963); Anders v. California, 386 U.S. 738 (1967).

clause was the reason for holding Virginia's miscegenation law invalid.[213] But attacks on criminal statutes setting higher punishments for recidivists,[214] on the imposition of a higher sentence on retrial than at the original trial,[215] and on the award of a new trial on the issue of punishment but not on the question of guilt[216] were all rebuffed despite claims of violation of the equal protection clause.

In the area of economic regulations and taxation, the Court almost invariably sustained the state classifications. With regard to taxes, the charge of invalid discrimination was generally rejected.[217] The only major tax case in which the taxpayer prevailed on grounds of improper classification was one imposing a tax at a different rate on domesticated foreign corporations.[218] The Court sustained a regulation of the sale of eyeglasses by opticians even though that regulation was inapplicable to over-the-counter sales of ready-to-wear glasses.[219] It held valid direct-action statutes against insurance companies[220] and a state law prohibiting sales below cost even to meet competition.[221] According to the Court, Sunday closing laws do not violate the equal protection clause[222]—which brings to mind Holmes' dictum in *Otis v. Parker*[223] in 1902: "The Sunday laws, no doubt, would be sustained by a bench of judges, even if every one of them thought it superstitious to make any day holy."[224] A ban on "debt adjustment" except by lawyers was also held proper.[225] Moreover, California's legislation discriminating against Florida avocados was held valid,[226] as was a full-crew law for railroad trains.[227] The single sport was *Morey v. Doud*,[228] in which the Court held that Illinois could not classify American Express along with the United States

213. Loving v. Virginia, 388 U.S. 1 (1967).

214. Oyler v. Boles, 368 U.S. 488 (1962).

215. North Carolina v. Pearce, 395 U.S. 711 (1969).

216. Brady v. Maryland, 373 U.S. 83 (1963).

217. Walters v. St. Louis, 347 U.S. 231 (1954); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959); Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959).

218. WHYY, Inc. v. Glassboro, 393 U.S. 177 (1968).

219. Williams v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

220. Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954).

221. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., 360 U.S. 334 (1959).

222. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617 (1961).

223. 187 U.S. 606.

224. 187 U.S. at 609.

225. Ferguson v. Skrupa, 372 U.S. 726 (1963).

226. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

227. Firemen v. Chicago, R.I. & P.R.R., 393 U.S. 129 (1968).

228. 354 U.S. 457 (1957).

Post Office and Western Union rather than with currency exchanges in the issuance of money orders. This case can be understood only as an expression of personal opinion by the Justices or as a requirement that categories be spelled out in descriptive terms rather than by proper names.

The exclusion of Konigsberg from the California bar because of his personal history was held offensive to the principles of equal protection.[229] But the exclusion of out-of-state lawyers was sustained.[230] In addition, if *Griffin v. Illinois* stands for the proposition that governments cannot discriminate between rich and poor, the Court in sustaining the federal reclamation acts nevertheless held it proper to distinguish between large landholders and small ones.[231]

On the other hand, the Court held that the equal protection clause prohibits a legal distinction between legitimate and illegitimate children for purposes of wrongful death statutes.[232] It also found that residency requirements for welfare recipients constitute an invidious discrimination.[233] But the bulk of the cases in which the clause was used to invalidate legislation concerned the exercise of the elective franchise. Racial designations on ballots were prohibited by *Anderson v. Martin*.[234] Similarly, a law prohibiting military personnel from registering as resident voters was outlawed.[235] The poll tax was invalidated in one of the Court's shakiest opinions, again resting on distinctions between the rich and the poor.[236] Furthermore, the Court found in three cases, that access to a position on the ballot was unduly restricted.[237] Only two challenges on equal protection grounds were not accepted in this field. A prisoner's right to an absentee ballot while in the penitentiary was held not to be justified by the Constitution;[238] and the power of a legislature, even a malapportioned one, to choose a governor after none of the candidates had secured a majority of the popular vote was upheld.[239]

These decisions under the equal protection clause do not, how-

229. Konigsberg v. State Bar of Cal., 353 U.S. 252 (1957).

230. Martin v. Walton, 368 U.S. 25 (1961).

231. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958).

232. Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

233. Shapiro v. Thompson, 394 U.S. 618 (1969).

234. 375 U.S. 399 (1964).

235. Carrington v. Rash, 380 U.S. 89 (1965).

236. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

237. Williams v. Rhodes, 393 U.S. 23 (1968); Hadnott v. Amos, 394 U.S. 358 (1969); Moore v. Ogilvie, 394 U.S. 814 (1969).

238. McDonald v. Board of Election Commrs., 394 U.S. 802 (1969).

239. Fortson v. Morris, 385 U.S. 231 (1966).

ever, reveal the extent of the egalitarian influence on the Warren Court's opinions. But they were more than sufficient to call forth Professor Cox's judgment that, after the demand for racial justice which he did not include in the egalitarian influence, "[e]galitarianism thus became the second powerful factor shaping current constitutional decisions."[240] A great deal more of the Court's business reflected this factor, for, as Professor Cox also said in a frequently quoted remark, "[o]nce loosed the idea of Equality is not easily cabined."[241] In part this expansionism may have been due to the amorphous nature of the substance of equality—a concept which is not always recognized, even when it is seen. In part the expansionist tendency of the idea of equality may have been due to its use as rhetoric rather than as an idea. And the rhetoric is subject to use, if not capture, by anyone on any side of the question.

Other constitutional provisions besides the equal protection clause command equality, and the Warren Court enforced these commands as well. The fifteenth amendment cases,[242] including *Gomillion v. Lightfoot*[243] in which Justice Frankfurter, in spite of himself, ignited the powder keg of reapportionment, are in this category. The construction given the citizenship clause of the fourteenth amendment makes it read as a barrier to any distinctions between native-born and naturalized citizens,[244] except, I suppose, with regard to eligibility for the Presidency. As I have suggested at length elsewhere, the decisions under the religion clauses of the first amendment also compel equality.[245] The twenty-fourth amendment, banning the condition of a poll tax for voting in federal elections, has an egalitarian flavor that the Court adopted for its own when it struck down Virginia's poll tax.[246] Certainly, too, the destruction of state power and the centralization of authority in the national government are part of this trend of seeking a uniform rule to govern

240. A. Cox, The Warren Court 6 (1968).

241. *Id.*

242. South Carolina v. Katzenbach, 383 U.S. 301 (1966); Gaston County v. United States, 395 U.S. 285 (1969). *See* Fiss, *Gaston County v. United States: Fruition of the Freezing Principle*, 1969 Sup. Ct. Rev. 379; Gould, *Racial Equality in Jobs and Unions, Collective Bargaining, and the Burger Court*, 68 Mich. L. Rev. 237, 254-57 (1969).

243. 364 U.S. 339 (1960). *See* Lucas, *Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 Sup. Ct. Rev. 194.

244. Schneider v. Rusk, 377 U.S. 163 (1964).

245. *See* Torcaso v. Watkins, 367 U.S. 488 (1961); Engel v. Vitale, 370 U.S. 421 (1962); Arlan's Dept. Store v. Kentucky, 371 U.S. 218 (1962); School Dist. of Abington Township v. Schempp, 374 U.S. 398 (1963); Chamberlin v. Dade County Bd. of Pub. Instruction, 377 U.S. 402 (1964); cases cited in note 222 *supra*; P. Kurland, Religion and the Law (1962); Kurland, *The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . .*", 1962 Sup. Ct. Rev. 1.

246. Harman v. Forssenius, 380 U.S. 528 (1965).

all. Even the void-for-vagueness cases[247]—which I prefer to denominate the vague-for-voidness cases—are essentially in this category, for they held in effect that the particular legislative classification in question was overbroad. The case of *Aptheker v. Secretary of State*[248] rested specifically on that proposition, and most of the cases concerned with Communists and subversives are not different in their constitutional question—that is, can these groups, as defined, be treated differently?

What must quickly become apparent is that all governmental processes necessarily involve the problem of classification and can be analyzed in terms of the propriety of their classifications. They are all subject to measurement against the demands of the equal protection clause. And the Court seems more and more ready to address them in just those terms. Some bases for classification are clearly forbidden or, at least, are highly suspect because of explicit terms of the Constitution; race is one, religion is another. But for the most part the test is the same as that which was put forth under the due process clause: Is it reasonable for a governmental body to classify in this way? It is not surprising that we see an appeal to the Court to engage in the development of "substantive equal protection," for "substantive equal protection" is but another name for "substantive due process." Each will do as well as the other as a means of limiting or destroying nonjudicial governmental authority.

"Substantive equal protection" is not a novel concept. It was utilized, for example, by the Taft Court in *Truax v. Corrigan*,[249] in which the Court held that a state law forbidding injunctions in labor cases was violative of the equal protection clause because injunctions remained available as a form of relief in other kinds of cases. The decision, like so many others that we have seen, was rendered by a Court which was divided five to four. Holmes and Brandeis were among the dissenters. Holmes, in keeping with his judicial philosophy, said: "Legislation may begin where an evil begins. If, as many intelligent people believe, there is more danger that the injunction will be abused in labor cases than elsewhere I can feel no doubt of the power of the legislature to deny it in such cases."[250]

I invoke the example of *Truax v. Corrigan* at this time for two reasons. First, it is a reminder of the fact that what we are talking

247. *See, e.g.*, cases cited in note 177 *supra*; Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

248. 378 U.S. 500 (1964).

249. 257 U.S. 312 (1921).

250. 257 U.S. at 343.

about is the allocation of power to, and the use of power by, the Court as an institution. As with the institution of the Presidency, the individuals change but the power accrued by the institution remains, until it is taken away. I do not know, but I can guess, that those who were anxious for Warren and company to have this discretionary power will be more wary of giving it to the Nixon Court, especially as it blossoms with new personnel.

The second reason for discussing *Truax* is to suggest that the notion of equality is multifaceted. Conformity and uniformity are also parts of equality. But even if we were to accept the egalitarian goal as contemporarily stated, we should be wary of making it our prime value. The modern definition, as I see it, I borrow from an Englishman, for England too has the same forces to confront, even if it lacks a Supreme Court with which to do it:

> The more nearly the citizens of a country resemble one another in the amount of money they spend, the goods they own, the education they acquire and the social deference they receive, the more nearly perfect the country will be.[251]

Yesterday, the exponents of this doctrine urged that the Supreme Court be the institution to determine the doctrine's applicability to the social, economic, and political scene in the United States. Tomorrow they may regret that this power is possessed by any governmental body, including the Supreme Court. As Geoffrey Gorer wrote:

> If mobilized public envy and resentment begrudge any social deference or conspicuous success outside the power hierarchy, then the way is being prepared for a single-value society. To the extent that the obverse of a desire for social justice is envy of, or resentment at, conspicuous success, rather than pity for conspicuous unsuccess, to that extent is the striving for a just state likely to result in a state where all power is concentrated in a single hierarchy, where all that will remain of a democracy will be a ritual whereby members at the top of the power hierarchy will exchange political positions among themselves at irregular intervals. Democracy depends on a multiplicity of values; if only a single value is emphasized democracy cannot survive.[252]

Those too young to remember what happened to Europe immediately prior to World War II, as country after country fell under the thrall of equality, may yet find the allegory of Orwell's *Animal Farm* instructive and frightening.

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251. G. GORER, THE DANGER OF EQUALITY 63 (1966).

252. *Id.* at 71.